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Supreme Court of the United States

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INCORPORATED; CAVALIER DAILY, INCORPORATED,

Petitioners,

—v.—

SUSAN R. SWECKER, Commissioner, Virginia Alcoholic Beverage Control Commission; PAMELA O'BERRY EVANS, Commissioner, Virginia Alcoholic Beverage Control Commission; W. CURTIS COLEBURN, III, Chief Operating Officer Virginia Department of Alcoholic Beverage Control; FRANK MONAHAN, Director, Law Enforcement Bureau of The Virginia Department of Alcoholic Beverage Control; ESTHER H. VASSAR, Commissioner, Virginia Alcoholic Beverage Control Commission,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Virginia law, alcohol advertisements may not appear in "college student publications," except under narrow and limited circumstances. This ban applies to Petitioners' newspapers, even though more than half their readers are adult. And, it was upheld by the Fourth Circuit even though the evidence shows that the state's asserted interest in combating underage drinking on college campuses can be accomplished more effectively through other means that do not involve the suppression of speech. The question presented is:

Whether the Fourth Circuit erred in holding that a ban on advertising alcohol in college student publications is constitutional under *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), in direct conflict with the Third Circuit, which struck down a nearly identical ban as a violation of the First Amendment.

PARTIES

The Petitioners are Educational Media Company at Virginia Tech, Inc. and The Cavalier Daily, Inc. Neither Petitioner has a parent corporation, nor does any publicly held corporation hold 10% or more of the stock in either Petitioner.

The Respondents are: Susan R. Swecker, Esther H. Vassar, and Pamela O'Berry Evans, Commissioners, Virginia Alcoholic Beverage Control Commission; W. Curtis Coleburn, III, Chief Operating Officer, Virginia Department Of Alcoholic Beverage Control; and Frank Monahan, Director, Law Enforcement Bureau of The Virginia Department Of Alcoholic Beverage Control.

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OPINIONS BELOW

The March 31, 2008 District Court opinion, which is unpublished, is reprinted at App. 1a.[1] The June 19, 2008 District Court opinion, which is unpublished, is reprinted at App. 51a. The Court of Appeals opinion, *Educational Media Co. at Virginia Tech, Inc. v. Swecker*, 602 F.3d 583 (2010), is reprinted at App. 67a. The Court of Appeals order denying rehearing en banc is reprinted at App. 92a.

JURISDICTION

The Court of Appeals judgment sought to be reviewed was issued on April 19, 2010. Rehearing en banc was denied on May 28, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition government for redress of grievances."

3 VAC 5-20-40 (B)(3) provides, in relevant part:

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[1] The abbreviation "App." refers to the Appendix to this Petition. The abbreviation "J.A." refers to the Joint Appendix filed in the Court of Appeals.

> Advertisements of beer, wine and mixed beverages are not allowed in college student publications unless in reference to a dining establishment, except as provided below. A "college student publication" is defined as any college or university publication that is prepared, edited or published primarily by students at such institution, is sanctioned as a curricular or extra-curricular activity by such institution and which is distributed or intended to be distributed primarily to persons under 21 years of age.
>
> Advertising of beer, wine and mixed beverages by a dining establishment in college student publications shall not contain any reference to particular brands or prices and shall be limited only to the use of the following words: "A.B.C. on-premises," "beer," "wine," "mixed beverages," "cocktails," or any combination of these words . . . .

STATEMENT OF THE CASE

The Collegiate Times And Cavalier Daily

The *Collegiate Times*, a student-run newspaper at the Virginia Polytechnic Institute and State University (Virginia Tech), is owned by Petitioner Educational Media Company at Virginia Tech (EMCVT), a nonprofit, 501(c)(3) Virginia corporation that owns several other print and broadcast media outlets. (J.A. 463) Four issues of the *Collegiate Times* are published each week during the fall and spring semesters, and

one issue is published each week during the summer semester. The *Collegiate Times* readership includes a significant number of readers who are age twenty-one or older. In 2004, the newspaper commissioned a survey of students, faculty and staff, which determined that 40.9% of student readers were under the age of twenty-one, while 59.1% were age twenty-one or older. Additionally, 100% of Virginia Tech staff who read the newspaper were age twenty-one or older. (J.A. 464, 470-71.) Copies of the *Collegiate Times* are distributed free of charge to the Virginia Tech community and are available on rack locations both on campus and around Blacksburg and the neighboring town of Christiansburg. (J.A. 464.) The newspaper's annual budget consists almost exclusively of the revenue generated through advertising. *Id.*

The Cavalier Daily, a student-run newspaper at the University of Virginia, is owned by Petitioner The Cavalier Daily, Inc., a nonprofit, 501(c)(3) corporation. (J.A. 476.) Five issues of *The Cavalier Daily* are published each week during the fall and spring semesters. Eight issues are published during the summer. Approximately 10,000 copies are distributed free of charge to the U. Va. community each day. (*Id.*) A significant portion of the paper's readership is over the age of twenty-one. As of September 2006, 49% of on-grounds students at U. Va. are under the age of twenty-one, while 51% are age twenty-one or older. (J.A. 480.) In addition to students, *The Cavalier Daily's* readership also includes university faculty and staff, who are generally over the age of twenty-one. (J.A. 477.)

Copies of *The Cavalier Daily* are available at locations throughout the U. Va. campus and at local restaurants in the city of Charlottesville. (*Id.*) The annual budget for *The Cavalier Daily* is comprised almost exclusively of the revenue it generates through advertising. (*Id.*)

The Challenged Regulation

The Virginia Department of Alcoholic Beverage Control ("ABC Department") is the state agency responsible for regulating the sale and distribution of alcoholic beverages in the Commonwealth of Virginia. The Alcoholic Beverage Control Board ("ABC Board") promulgates regulations relating to the sale and distribution of alcoholic beverages. Va. Code § 4.1-111.

Among the regulations enacted by the ABC Board is 3 VAC 5-20-40 (B)(3), which prohibits all alcohol advertising in "college student publications" "unless in reference to a dining establishment." A "college student publication," is defined as a "publication that is prepared, edited or published primarily by students at such institution, is sanctioned as a curricular or extra-curricular activity by such institution and which is distributed or intended to be distributed primarily to persons under 21 years of age." ABC considers both the *Collegiate Times* and *The Cavalier Daily* to be "college student publications" subject to the regulations in 3 VAC 5-20-40 (B), although they both have significant readership over the age of twenty-one. (J.A. 464, 472, 477, 523.) Because of that regulation, the Petitioners have had to turn away businesses that wished to

purchase alcoholic beverage advertisements (J.A. 464, 477), while those same businesses are able to advertise in competing, non-student newspapers. (J.A. 465, 478.) Each of the Petitioners estimated that they lose approximately $30,000 per year due to the prohibition on alcohol advertising in college student publications. (J.A. 465, 477.)

Notwithstanding the ban on alcohol advertising in college student publications, students at both the University of Virginia and Virginia Tech are continually exposed to alcoholic beverage advertising, in other newspapers, magazines, on television and on the Internet. (J.A. 465, 478, 486.)

The Ineffectiveness of the Challenged Regulation

The Petitioners' expert, Jon P. Nelson, Ph.D., is Professor Emeritus of economics at Penn State University who has done extensive research on the effect of alcohol advertising on consumption. (J.A. 481-82.) His research indicates that alcohol advertising serves mainly to promote brand loyalty, rather than to increase overall consumption of alcohol. (J.A. 484-486.) Moreover, a ban on alcohol advertising in one segment of the media results in a "substitution effect"; that is, advertisers simply increase their advertising in other media to reach the same audience. (J.A. 485-86.)

Moreover, studies of college student drinking have not found alcohol advertising to be a factor in students' alcohol consumption. The drinking behavior of students is significantly affected by such variables as high school drinking,

membership in fraternities and sororities, athlete status, gender and race. (J.A. 487.) Despite extensive research on college student drinking, no study has linked students' alcohol consumption to advertising. (J.A. 487-88.) Dr. Nelson concluded that there is no evidence to support a ban on alcohol advertising in college newspapers. (J.A. 486.)

The defendant's expert, Dr. Henry Saffer, opined that alcohol advertising in college newspapers increases alcohol consumption by students. However, in his most recent paper on alcohol advertising, as well as in his deposition, he acknowledged that "[t]here is very little empirical evidence that alcohol advertising has any effect on actual alcohol consumption." (J.A. 310-11, 326.)

Dr. Saffer has also repeatedly noted that a ban on alcohol advertising in one segment of the media results in increased advertising in other media: "A ban on one or two media, such as television or radio, will result in substitution to available alternative media." Thus, "there is no reason to expect that a ban in a given medium will have an effect on alcohol consumption." Saffer, *Alcohol Advertising and Youth* at 175 (J.A. 346. *See also* J.A. 343, 311-13.) Dr. Saffer stated that such a substitution effect would not result from ban on alcohol advertisement in college newspapers, because "[t]here isn't a good substitute for a college newspaper." (J.A.313.) However, he offered no research or other evidence to support this claim.

Dr. Saffer also testified that increased taxation of alcohol is a more effective way to combat underage drinking and binge drinking than advertising bans. (J.A. 532, 319.) Additionally, counteradvertising that corrects students' inaccurate perceptions about how much other people drink has been shown to be effective at reducing alcohol consumption on college campuses. (J.A. 20.) In a 2002 article, Dr. Saffer observed that "increased counteradvertising, rather than new advertising bans, appears to be the better choice for public policy." (J.A. 351.)

Proceedings Below

Petitioners challenged the regulation as unconstitutional on its face and as applied. On cross-motions for summary judgment, the district court held the regulation facially unconstitutional under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980),[2] because it does not directly and materially advance a

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[2] In *Central Hudson*, the Court set forth a four-part standard for evaluating restrictions on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566.

substantial governmental interest and is more extensive than necessary to serve the state's asserted interest. (App. 40a, 45a). Given this holding, the district court found it unnecessary to reach the newspapers' alternate argument that the regulation unconstitutionally discriminates against a particular segment of the media. In a subsequent opinion, the court enjoined the Respondents from enforcing the regulation. (App. 51a.)

A divided panel of the Court of Appeals reversed, holding that the advertising ban satisfies the *Central Hudson* test. (App. 80a .) The panel declined to address "in the first instance" whether the regulation is unconstitutional as applied to the plaintiff newspapers, or whether it unconstitutionally discriminates against a particular segment of the media. (App. 72a.) The Court of Appeals denied Petitioners' motion for rehearing or rehearing en banc. (App. 93a.)

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT DECISION DIRECTLY CONFLICTS WITH A DECISION FROM THE THIRD CIRCUIT.

In *Pitt News v. Pappert*, 379 F.3d 96 (3rd Cir. 2004), the Third Circuit held that a nearly identical ban[3] on paid alcohol advertising in

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[3] The statute at issue in *Pitt News* stated: "No advertisement [for alcoholic beverages] shall be permitted, either directly or indirectly, in any booklet, program book, yearbook, magazine, newspaper, periodical, brochure,

college newspapers did not satisfy the *Central Hudson* test. In a decision by then-Judge Alito, the court found that the restriction did not directly and materially advance the state's interest in curtailing underage and abusive drinking because it did nothing to limit the bombardment of alcohol advertising from other sources, such as television, radio, and other publications. 379 F.3d at 107-08. Contrary to the Fourth Circuit in this case, the Third Circuit also held that the ban on alcohol advertising in newspapers was not narrowly tailored, because "more than 67% of Pitt students and more than 75% of the total University population is over the legal drinking age," and because "the Commonwealth can seek to combat underage and abusive drinking by other means that are far more direct and that do not affect the First Amendment." *Id.* at 108. Finally, the Third Circuit held that the advertising restriction was unconstitutional "for an additional, independent reason: it unjustifiably imposes a financial burden on a particular segment of the media, i.e., media associated with universities and colleges." *Id.* at 109.

Certiorari should be granted to address this direct circuit conflict on the application of *Central Hudson*, a conflict that the Fourth Circuit neither acknowledged nor addressed in its decision.

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circular or other similar publication published by, for or in behalf of any educational institution." 379 F.3d at 102.

II. THE DECISION BELOW REFLECTS A FUNDAMENTAL MISUNDERSTANDING REGARDING *CENTRAL HUDSON* THAT WARRANTS PLENARY REVIEW BY THIS COURT.

A. The Court Of Appeals Mistakenly Substituted "Common Sense" For Evidence In Upholding the Challenged Ban.

Under the third *Central Hudson* prong, the government must demonstrate that an advertising regulation "directly advances the governmental interest asserted," *Central Hudson*, 447 U.S. at 566, and does so "to a material degree." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626 (1995). Although this Court has said that such a link may be supported by "history, consensus, and simple common sense," *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 555 (2001), it has also stated that the government's burden "is not satisfied by mere speculation or conjecture," or if the law "provides only ineffective or remote support for the government's purposes." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). "[T]his requirement [is] critical; otherwise, 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'" *Rubin v. Coors Brewing*, 514 U.S. 476, 487 (1995) (quoting *Edenfield*, at 771).

For example, in *Edenfield*, the Court considered a ban on direct, in-person solicitation by certified public accountants. The Court held

that the regulation did not directly and materially advance the Florida Board of Accountancy's interests in preventing fraud and overreaching by CPAs and ensuring their professional independence:

> [The Board] presents no studies that suggest personal solicitation of prospective business clients by CPA's creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear. The record does not disclose any anecdotal evidence, either from Florida or another State, that validates the Board's suppositions. This is so even though 21 States place no specific restrictions of any kind on solicitation by CPA's, and only 3 States besides Florida have enacted a categorical ban.

507 U.S. at 771.

In this case, the different conclusions reached by the panel majority and the dissent reflect a different understanding of the extent to which a "common sense" understanding of the link between a regulation and its purpose trumps empirical evidence of the regulation's ineffectiveness. The majority relied entirely on a purportedly "common sense" analysis to find a link between the alcohol advertising ban and underage drinking and binge drinking on campus:

> Though the correlation between advertising and demand alone is insufficient to justify advertising bans in every situation . . ., here it is strengthened because "college

> student publications" primarily target college students and play an inimitable role on campus. . . . This link is also supported by the fact that alcohol vendors *want* to advertise in college student publications. It is counterintuitive for alcohol vendors to spend their money on advertisements in newspapers with relatively limited circulation, directed primarily at college students, if they believed that these ads would not increase demand by college students.

App. 77a (citation omitted) (emphasis in original).[4]

As in *Edenfield*, the government here has presented no studies, or even anecdotal evidence, to support the connection between a ban on alcohol advertising in college newspapers and a decrease in underage and abusive drinking. Although the ban has been in place for decades, "underage and abusive drinking by college students has not diminished since the enactment of this regulation." App. 85a (Moon, J., dissenting). Nor was the state able to demonstrate, even through anecdote or unscientific comparisons, that Virginia has a

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[4] As Judge Moon observed in dissent, "The Board's justification for the regulation is not to reduce general 'demand by college students,' a significant number of whom are of legal age to imbibe, but to reduce '*underage* and *abusive* drinking among college students.'" App. 86a. The majority's analysis does not draw a connection between an alcohol advertising ban and these *specific* harms.

lower incidence of these problems than states without such a ban.

Instead, "[t]he evidence in the record indicates such a link [between the alcohol advertising ban and the state's interests] is speculative at best." App. 85a (Moon, J., dissenting). As described *supra* at 6, the government's own expert, Dr. Saffer, acknowledged that "[t]here is . . . very little empirical evidence that alcohol advertising has any effect on actual alcohol consumption" (J.A. 310-11, 326), and that a ban on advertising in one medium results in greater advertising in other media or other forms of marketing. *See* J.A. 343; 350.

Even accepting, against the weight of the evidence, the "common sense" link between an advertising ban in college newspapers and underage and binge drinking, there is no basis for finding that the ban advances the state's interests "*to a material degree.*" *Edenfield* at 771 (emphasis added).[5] Dr. Saffer acknowledged

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[5] *Cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. at 505 ("We can agree that common sense supports the conclusion that a prohibition against price advertising . . . will tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market. Despite the absence of proof on the point, we can even agree with the State's contention that it is reasonable to assume that demand, and hence consumption throughout the market, is somewhat lower whenever a higher, noncompetitive price level prevails. However, without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will *significantly* advance the State's interest in promoting temperance.") (emphasis added)

that he had no idea how much the ban actually affects drinking behavior. (J.A. 323.) *See 44 Liquormart*, 517 U.S. 484, 506-07 (1996) (opinion of Stevens J., joined by Kennedy and Ginsberg, JJ.) (noting that "the State has not identified what price level would lead to a significant reduction in alcohol consumption, nor has it identified the amount that it believes prices would decrease without the ban.") Indeed, Dr. Saffer's own study showed that even in the *aggregate* – taking into account multiple media – advertising has only a "modest effect on annual alcohol participation and binge participation." (J.A. 342.) If an advertising ban in multiple media has only a modest effect, then the effect, if any, of banning advertising in only a small segment of the media is certainly not "material."

The Court of Appeals' reliance on common sense and disregard for the evidence also resulted in a reversal of the burden of proof. The court found that "[t]he college newspapers fail to provide evidence to *specifically* contradict this link [between advertising in college newspapers and student drinking] or to recognize the distinction between ads in mass media and those in targeted local media." App. 77a (emphasis in original). But this Court has repeatedly held that government has the burden to show that the advertising restrictions directly advance its interests. *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 183 (1999); *Edenfield*, 507 U.S. at 770. It is not the newspapers' burden to disprove such a link. *Cf. Pitt News*, 379 F.3d at 107 ("[T]he *Commonwealth* has not pointed to any evidence that eliminating

ads in this narrow sector will do any good.") (emphasis added).

This case provides an appropriate vehicle for the Court to clarify the role of "common sense" in the third *Central Hudson* prong.[6]

B. The Court Of Appeals Adopted A Watered-Down Version Of The Narrow Tailoring Test That Undermines *Central Hudson*.

Under the fourth part of the *Central Hudson* test, "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." 447 U.S. at 564. The Court of Appeals found that the alcohol advertising ban is sufficiently tailored because "the restriction only applies to . . . campus publications targeted at students under twenty-one. It does not, on its face, affect all possible student publications on campus." App. 79a.

That result is flawed for two critical reasons. First, the ban on alcohol advertising

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[6] The term "common sense" implies that reasonable jurists will reach similar conclusions about similar regulations. But then-Judge Alito found that common sense demanded the opposite conclusion from that of the Fourth Circuit. Noting that college students are exposed to a "torrent" of alcohol ads from other sources, he found that "[t]he suggestion that the elimination of alcoholic beverage ads from *The Pitt News* and other publications connected with the University will slacken the demand for alcohol by Pitt students is *counterintuitive* and unsupported by any evidence that the Commonwealth has called to our attention." *Pitt News*, 379 F.3d at 107 (emphasis added).

may be targeted at college publications but it is not targeted at underage drinkers. Petitioners' newspapers are both covered by the law even though more than half the readership of both papers is adult. Second, a direct ban on speech is not narrowly tailored under *Central Hudson* if the state's asserted interest could be advanced at least as effectively without suppressing speech, which is precisely what the evidence shows in this case. In contrast to the advertising ban, which enjoys no empirical support, raising taxes and counteradvertising have both been proven to reduce this kind of drinking, as the state's own expert confirmed. (J.A. 319, 351.) The existence of such alternative measures indicates a lack of tailoring in the alcohol advertising ban.

In *44 Liquormart,* both the plurality and the concurring justices stressed the availability of non-speech alternatives in striking down a ban on price advertising. *See* 517 U.S. at 507 (plurality opinion) ("As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation"); *Id.* at 530 (concurring opinion of O'Connor, J., joined by Rehnquist, Breyer and Souter, JJ.) ("Rhode Island's own expert conceded that the objective of lowering consumption of alcohol by banning price advertising could be accomplished by establishing minimum prices and/or by increasing sales taxes on alcoholic beverages.") (internal quotation marks and citation omitted).

The Court of Appeals demonstrated further confusion about the narrow tailoring requirement of *Central Hudson* by noting that the state had

implemented several responses to the problem of underage drinking in addition to the advertising ban, including education and enforcement programs. But that misses the point. Under *Central Hudson,* a direct restriction on speech is not narrowly tailored simply because the state has previously (or is simultaneously) pursuing other options. Here, there is no evidence that the advertising ban makes the state's education and enforcement programs more effective. On the other hand, there is persuasive evidence that the state's interest in combating underage drinking on college campuses is more effectively achieved by other non-speech means that the state has yet to pursue.

The Court should grant *certiorari* to clarify that, even if the government employs some non-speech steps to address a problem, an advertising restriction is not narrowly tailored if additional alternative measures would be more effective.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INC., and THE CAVALIER DAILY, INC.,

Plaintiffs,

v. Civil Action No. 3:06CV396

SUSAN R. SWECKER, *et al.*,

Defendants.

MEMORANDUM OPINION

This case presents the question of whether two regulations of the Virginia Administrative Code, which prohibit certain words in advertisements for alcoholic beverages and advertisements within college student publications, violate the First Amendment to the United States Constitution.[1] 3 VAC 5-20-40(A), the first challenged regulation, pertains to all advertisements and reads as follows:

[1] "Congress shall make no law ... abridging the freedom of speech. ..." U.S. Const, amend. I.

A. Beer, wine and mixed beverage advertising in the print or electronic media is permitted with the following exceptions:

1. All references to mixed beverages are prohibited except the following: "Mixed Drinks," "Mixed Beverages," "Exotic Drinks," "Polynesian Drinks," "Cocktails," "Cocktail Lounges," "Liquor" and "Spirits";

2. The following terms or depictions thereof are prohibited unless they are used in combination with other words that connote a restaurant and they are part of the licensee's trade name: "Bar," "Bar Room," "Saloon," "Speakeasy," or references or depictions of similar import; and

3. Any references to "Happy Hour" or similar terms are prohibited.

The second challenged regulation, 3 VAC 5-20-40(B)(3), pertains to advertisements in college publications and provides the following:

> 3. Advertisements of beer, wine and mixed beverages are not allowed in college student publications unless in reference to a dining establishment, except as provided below. A "college student publication" is defined as any college or university publication that is prepared, edited or published primarily by students at such institution, is sanctioned as a curricular or extra-curricular activity by such institution and which is distributed or intended to be

> distributed primarily to persons under 21 years of age.
>
> Advertising of beer, wine and mixed beverages by a dining establishment in college student publications shall not contain any reference to particular brands or prices and shall be limited only to the use of the following words: "A.B.C. on-premises," "beer," "wine," "mixed beverages," "cocktails," or any combination of these words ....

Plaintiffs seek a declaratory judgment and an injunction against the continued enforcement of these two regulations.[2] (Compl. ¶ 1.) The parties consented to this Court's jurisdiction pursuant to 28 U.S.C. §§ 636 and filed cross-motions for summary judgment. (Docket Nos. 16, 18.) Jurisdiction is premised on 28 U.S.C. § 1331 and 42 U.S.C. § 1983. The Court held oral argument and the Motions are ripe for adjudication.

I. Standard of Review

Summary judgment under Rule 56 is appropriate only when the Court, viewing the

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[2] The parties have agreed that consideration of a third regulation, 3 VAC 5-20-50(A)(3), which limits advertising of "spirits" in college student or other publications "primarily relating to intercollegiate athletic events," is not necessary for resolution of Plaintiff s claims. (Stipulation ¶ 4.) It does not overlap with the regulations challenged at bar. *Id.* Because Regulation 5-20-50- (A)(3) is not challenged in the complaint, the Court will not address it.

record as a whole and in the light most favorable to the nonmoving party, determines that there exists no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See, e.g., Celolex Corp. v. Catrett*, All U.S. 317, 322-24 (1986), *Anderson v. Liberty* Lobby, Inc., 477 U.S. 242, 248-50 (1986). Once a party has properly filed evidence supporting the motion for summary judgment, the nonmoving party may not rest upon mere allegations in the pleadings, but must instead set forth specific facts illustrating genuine issues for trial. *Celotex*, All U.S. at 322-24. These facts must be presented in the form of exhibits and sworn affidavits. Fed. R. Civ. P. 56(c).

A court views the evidence and reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Anderson*, All U.S. at 255. Whether an inference is reasonable must be considered in conjunction with competing inferences to the contrary. Sylvia *Dev. Corp. v. Calvert County*, 48 F.3d 810, 818 (4th Cir. 1995). Nonetheless, the nonmoving party is entitled to have "'the credibility of his evidence as forecast assumed.'" *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990)(en banc)(*quoting Charbonnages de France v. Smith*, 597 F.2d 406,414 (4th Cir. 1979)). Ultimately, the court must adhere to the affirmative obligation to bar factually unsupportable claims from proceeding to trial. *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (*citing Celotex*, All U.S. at 323-24).

II. Findings of Facts

Plaintiff Educational Media

1. Plaintiff Educational Media at Virginia Tech, Inc., is a non-profit, 501(c)(3) Virginia corporation that owns several print and broadcast media outlets, including the Collegiate Times, a student-run newspaper at Virginia Polytechnic Institute and State University ("Virginia Tech"). (Compl. ¶ 3; Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 2.) Virginia Tech is located in Blacksburg, Virginia.

2. Approximately 98.7% of the *Collegiate Times*' annual budget came from advertising in the year 2005. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 7.)

3. Four issues of the *Collegiate Times* are published each week (Tuesday through Friday) during the fall and spring semesters, during which it has a daily circulation of approximately 14,000. One issue is published each week (Thursdays) during the summer semester, during which it has a daily circulation of approximately 5,000. (Compl. ¶ 15; Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 4.)

4. Copies of the *Collegiate Times* are distributed free of charge at approximately 73 rack locations throughout the Virginia Tech campus, as well as around Blacksburg and the neighboring town of

Christiansburg. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 6.) In 2006, 775 copies per issue were distributed off-campus, out of a total circulation of 14,000. (Defs.' Mem. Supp. Mot. Summ. J., Encl. XI, ¶ 3.) Approximately 40% of the total readership of the *Collegiate Times* is under the age of 21. (Defs.' Mem. Supp. Mot. Summ. J., Encl. VI, Wolff. Dep. 22.) Approximately 41%[3] of the student readership of the *Collegiate Times* is under the age of 21. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 5, Attach. A; Defs.' Mem. Supp. Mot. Summ. J., Encl. XI, ¶ 1.)

5. The *Collegiate Times* is a "college student publication" subject to the regulation in 3 VAC 5-20-40(B).

6. The *Collegiate Times* has been approached by businesses who expressed an interest in placing advertisements for alcoholic beverages in the newspaper: Chateau Morrissette, a winery, which sought to place advertisements for Hokie Wine; the

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[3] Plaintiffs cite a 2004 study, which found that 40.9% of student readers were under the age of 21. (Pls.' Mem. Supp. Mot. Summ. J. ¶ 4.) Defendants cite the same study, as reported in Interrogatory Answers from the Plaintiff, and calculate a figure of 41.7% of student readers under the age of 21. (Defs.' Mem. Supp. Mot. Summ. J., Encl. XI at l)(stating that 58.3% of student readers of *Collegiate Times* are over the age of 21). The Court does not find that this constitutes a material dispute of fact.

Blacksburg Brewing Company, which sought to place advertisements for keg delivery; and Boudreaux Restaurant, which sought to place advertisements regarding drink specials. (Compl. ¶ 20; Defs.' Mem. Supp. Mot. Summ. J., Encl. XI, ¶ 6.) Plaintiff has no other information regarding the size, quantity, frequency, or price of such desired advertisements. (Defs.' Mem. Supp. Mot. Summ. J., Encl. VI, Wolff Dep. 17-21, 24-25, 30.) The *Collegiate Times* also was approached by the Knights of Columbus seeking to advertise for a Blacksburg Wine Festival. (Pls.' Reply Supp. Mot. Summ. J., Ex. 10, Wolff Supp. Decl. ¶ 2.) An Alcoholic Beverage Control ("ABC") compliance officer advised that the ad would run afoul of 3 VAC 5-20-40, so the paper did not run the ad. (*Id.* at ¶ 3.) A loss of $361.69 in advertising revenue ensued. (*Id.* at ¶ 4.)

7. The *Collegiate Times* also is unable to participate in national ad buys for alcohol products. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 10.)

8. Other competing, non-student newspapers, such as *The Roanoke Times*, are not subject to 3 VAC 5-20-40(B)(3) but are widely available in Blacksburg. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 15.)

9. As a result of the advertising restrictions on college newspapers in 3 VAC 5-20-40(B)(3), the *Collegiate Times* estimates

losses of approximately $30,000 per year, based on estimated sales of alcohol advertisement of one-quarter page per issue. This estimation is not based on documentation but, rather, the conjecture of the General Manager of Educational Media Company at Virginia Tech, Inc. (Pls.' Mem. Supp. Mot. Summ. J. ¶ I; Ex. 1, Wolff Decl. ¶ 11.)

10. Virginia Tech believes that misuse and abuse of alcohol is a serious problem and interferes with the goals of the university. Almost 80% of Virginia Tech students consumed alcohol in the last year, though anywhere from 46 to 51%[4] of the student population was under 21 years of age, and the binge drinking rate at Virginia Tech is significantly higher than the national average. (Defs.' Mem. Supp. Mot. Summ. J., Encl. I, Keene Aff. ¶¶ 6-7, 9-10.) Additionally, the total alcoholic beverage violations, liquor law violations, and disciplinary actions related to alcohol have increased during the past few years. (*Id.* at ¶¶ 17, 19-21.) Virginia Tech uses a variety of educational programs to prevent the use of alcoholic beverages by those not of legal age, such as workshops, peer educational

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[4] This number fluctuates between measurements at the beginning of fall and spring semesters (Defs.' Mem. Supp. Mot. Summ. J., Encl. I, Keene Aff. ¶¶ 6-7), presumably as the student population ages and reaches the age of 21.

programs, and media campaigns. (*Id.* at ¶¶ 15, 22.)

Plaintiff *The Cavalier Daily*

11. Plaintiff The Cavalier Daily, Inc., is a non-profit, 501(c)(3) Virginia Corporation, which publishes *The Cavalier Daily*, a student-run newspaper at the University of Virginia ("UVA"). (Compl. ¶ 4; Pls.' Mem. Supp. Mot. Summ. J., Ex. 2, Slaven Decl. ¶ 3.) UVA is located in Charlottesville, Virginia.

12. The annual budget for *The Cavalier Daily* is comprised almost exclusively of the revenue it generates through advertising. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 2, Slaven Decl. ¶ 9.)

13. Five issues of *The Cavalier Daily* are published each week during the fall and spring semesters and eight issues are published during the summer. Approximately 10,000 copies are distributed free of charge each day. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 2, Slaven Decl. ¶ 5.)

14. Copies of *The Cavalier Daily* are distributed at approximately 60-65 locations on campus and 5 locations off campus, at local restaurants in the city of Charlottesville. (Defs.' Mem. Supp. Mot. Summ. J., Encl. VII, Slaven Dep. 8.)

15. Approximately 49% of "on-grounds" students at UVA are under the age of 21. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 2, Slaven Decl. ¶ 6.) Between 36-42% of all UVA students, both undergraduate and graduate, are under the age of 21. (Defs.' Mem. Supp. Mot. Summ. J., Encl. IV, Rue Aff. ¶¶ 3-4.) In addition to students, *The Cavalier Daily* readership also includes university faculty and staff, who are generally over the age of 21. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 2, Slaven Decl. ¶ 7.)

16. *The Cavalier Daily* is a "college student publication" subject to the regulation in 3 VAC 5-20-40(B).

17. *The Cavalier Daily* has been approached three times by businesses who expressed an interest in placing advertisements for alcoholic beverages in the newspaper: Sukura; Coupe DeVille's; and the Satellite Ballroom, which sought to advertise "mojito night." (Defs.' Mem. Supp. Mot. Summ. J., Encl. VII, Slaven Dep. 18-21.) Plaintiff has no other information regarding the size, quantity, frequency, or price of such desired advertisements. (*Id.*)

18. Other free, competing, non-student newspapers, such as *C'Ville Weekly* and *The Hook*, are not subject to 3 VAC 5-20-40(B)(3) but are widely distributed on UVA grounds. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Slaven Decl. ¶ 15.)

19. As a result of the advertising restrictions on college newspapers in 3 VAC 5-20-40(B)(3), *The Cavalier Daily* estimates losses of approximately $30,000 per year, based on estimated sales of alcohol advertisement of one-quarter page per issue. This estimation is not based on documentation but, rather, the conjecture of the newspaper's Editor-in-Chief from January 28, 2006, through January 27, 2007. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 2, Slaven Decl. ¶ 13.)

20. UVA takes the problem of high risking drinking seriously. (Defs.' Mem. Supp. Mot. Summ. J., Encl. II, Bruce Aff. ¶ 3.) The university provides a number of programs designed to reduce the incidence of underage drinking and over-consumption of alcohol on campus, such as peer education programs, committees, and intervention and treatment programs. (*Id.* at ¶¶ 5-7.) Nevertheless, a number of alcohol-related offenses, including DUIs and serious physical assaults, are adjudicated by the UVA Judiciary Committee each year. (Defs.' Mem. Supp. Mot. Summ. J., Encl. IV, Rue Aff. ¶¶ 9-10.) Additionally, there are numerous alcohol-related visits to emergency rooms by UVA students. (*Id.* at ¶¶ 11.)

Defendants Susan Swecker, *et al.*

21. The Virginia ABC Department is the state agency responsible for regulating the sale and distribution of alcoholic beverages in the Commonwealth of Virginia. The ABC Board promulgates regulations relating to the sale and distribution of alcoholic beverages.

22. The defendants are: Susan R. Swecker, Esther H. Vassar (Chair), and Pamela O'Berry Evans, Commissioners of the ABC Board; Curtis Coleburn, 111, Chief Operating Officer ("COO") of the ABC Department; and Frank Monahan, Director of the Law Enforcement Bureau of the ABC Department. (Defs.' Mem. Supp. Mot. Summ. J. ¶ 3.)

23. The purpose of the ABC Department is to regulate the sale, distribution, and manufacture of alcoholic beverages in the interest of the public health, safety, and welfare. (Defs.' Mem. Supp. Mot. Summ. J. ¶ 5; Encl. V, Coleburn Dep. at 16-17.)

Expert Testimony, Research, and Other Opinion Testimony.

24. Defendants present a declaration from Henry Saffer, Ph.D. Dr. Saffer is a tenured full professor of economics at Kean University in Union, New Jersey, as well as a Research Associate in Health Economics at the National Bureau of Economic Research. (Defs.' Mem. Supp. Mot. Summ.

J., Encl. III, Saffer Decl. ¶ 1.) Dr. Saffer has researched the impact of advertising on alcohol use and related outcomes. (*Id.* at ¶ 2.) He finds that prior research on this subject has suffered methodological problems. Specifically, he notes that previous studies based on time series data aggregate the data in such a way that variance is erroneously reduced. (*Id.* at ¶ 14.) Dr. Saffer, conversely, uses 'cross-sectional data for his studies, which he claims is more reliable than time series data. (*Id.* at ¶ 15.)

25. Dr. Saffer has authored two empirical studies using cross-sectional data. (*Id.* at ¶¶ 16- 17.) The first, "Alcohol Advertising and Highway Fatality Rates," ultimately found that for subjects between the ages of 18-20 years, alcohol advertising increased highway fatalities in two of four models. (*Id.* at ¶ 16.) The second, "Alcohol Advertising and Alcohol Consumption by Adolescents," examined subjects between the ages of 12 and 19. (*Id.* at ¶ 17.) The results found that a 28% reduction in total alcohol advertising would reduce monthly alcohol participation from about 25% to 21-24%. Additionally, a 28% reduction in total alcohol advertising would reduce binge drinking participation from 12% to 8-11%. (*Id.*) In sum, Dr. Saffer believes that an aggregate of advertising increases overall alcohol consumption. (Defs.' Mem. Supp. Mot. Summ. J., Encl. X, Saffer Dep. 11.)

26. Defendants present a declaration from Frances Keene, Director of Judicial Affairs at Virginia Tech since 2004. (Defs.' Mem. Supp. Mot. Summ. J., Encl. I, Keene Aff.) The declaration discusses data primarily from 2003-onward, but encloses a study including data from as early as 1998. (*Id.* and Attach. A.) Keene states that, "[b]ased upon my knowledge and experience, I believe that regulation 3 VAC 5-20-40(B) will effectively assist in Virginia Tech's efforts to prevent the consumption of alcoholic beverages by those students under the age of 21 and the over consumption of alcoholic beverages by our students." (Keene Aff. ¶ 23.)

27. Defendants present a declaration from Susan Bruce, Director of the Center for Alcohol and Substance Abuse Education (CASE) at UVA since 2000. (Defs.' Mem. Supp. Mot. Summ. J., Encl. II, Bruce Aff.) The declaration discusses UVA's current implementation of the prevention model of the National Academy of Science's Institute of Medicine to affect "three prevention populations" of college students who could be exposed to alcohol. (*Id.* at ¶¶ 4-7.) Bruce states that, "[b]ased upon my knowledge and experience, I believe that regulation 3 VAC 5-20-40(B) will effectively assist in UVA's efforts to prevent the consumption of alcoholic beverages by those students under the age of 21 and the over

consumption of alcoholic beverages by our students." (*Id.* at ¶ 8.)

28. Defendants present a declaration from Penny Rue, Dean of Students at UVA since 1999. (Defs.' Mot. Supp. Mot. Summ. J., Encl. IV, Rue Aff.) The declaration discusses UVA's multifaceted efforts to "maintain an educational environment that promotes a healthy lifestyle and is free from underage and abusive alcohol use." (*Id.* at ¶ 6.) The declaration discusses data primarily from 2005-onward, but encloses a study including data from as early as 2000. (*Id.* at ¶¶ 9-12 and Attachs. A-B.) Rue states that, "[b]ased upon my knowledge and experience, I believe that regulation 3 VAC 5-20-40(B) will effectively assist in UVA's efforts to prevent the consumption of alcoholic beverages by those students under the age of 21 and the over consumption of alcoholic beverages by our students." (*Id.* at ¶ 13.)

29. Defendants present a declaration from W. Curtis Coleburn, COO of the ABC Department since 1999. (Defs.' Resp. to Pls.' Mot. Summ. J., Encl. I, Coleburn Aff.) The declaration touts a comprehensive approach toward combating underage and abusive alcohol consumption on college campuses. (*Id.* at ¶ 4.) Coleburn states that, "[b]ased upon my knowledge and experience, I believe that regulation 3 VAC 5-20-40(B) will effectively assist in ABC's

comprehensive efforts to prevent or reduce the consumption of alcoholic beverages by those students under the age of 21 and the over consumption of alcoholic beverages by college students." (*Id.* at ¶ 9.)

30. Plaintiffs present a declaration from Jon P. Nelson, Ph.D. Dr. Nelson is an Economics Professor Emeritus at Pennsylvania State University. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 3, Nelson Decl. ¶ 1.) During the past 20 years, the major focus of his research has been the economics of advertising, especially the advertising and marketing of alcoholic beverages, and he has published 18 articles and chapters on these topics. (*Id.* at ¶ 3.) Dr. Nelson was not paid or compensated to prepare his declaration. (*Id.* at ¶ 23.)

31. Dr. Nelson is of the opinion that advertising bans, partial or comprehensive, do not reduce the demand for alcohol. (*Id.* at ¶ 9.) Specifically, he believes that 3 VAC 5-20- 40A, permitting only certain words in all media, would not have any affect on alcohol consumption. (*Id.* at ¶¶ 19-20.) Also, Dr. Nelson opines that 3 VAC 5-20-40B cannot possibly have the effect of substantially or materially reducing underage drinking or binge drinking on college campuses in Virginia. (*Id.* at ¶ 9.)

32. Dr. Nelson also offers a rebuttal declaration to the Defendants' expert, Dr. Saffer. He identifies methodological

inconsistencies with Dr. Saffer's research. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 4, Nelson Rebuttal Decl. ¶ 3.) Dr. Nelson asserts that Dr. Saffer has ignored five adverse cross-sectional studies in his literature review. (*Id.* at ¶ 4.) Dr. Nelson contends that some studies lack data on college students or alcohol ads placed in college newspapers. (*Id.* at ¶¶ 15-16.) Dr. Nelson also opines that Dr. Saffer's research fails to draw a causal link between advertising in college newspapers and underage alcohol consumption. (*Id.* at ¶19.)

III. Analysis

A. Standing

Before addressing the underlying merits of this action, the Court must first consider whether Plaintiffs have standing to bring this suit. The United States Constitution permits courts to adjudicate only "Cases" or "Controversies." U.S. Const, art. Ill, § 2. A court must inquire into standing to ensure that the parties have enough of a stake in the case to litigate the issues properly. *See Pye v. United Stales*, 269 F.3d 459, 466 (4th Cir. 2001). This requires a plaintiff to demonstrate standing by showing that he or she has suffered a judicially cognizable and redressible injury. In order to demonstrate a cognizable injury, a plaintiff must show that: (1) he or she has personally suffered an actual or threatened injury that is concrete and

particularized, not conjectural or hypothetical; (2) the injury fairly can be traced to the challenged action; and, (3) the injury is likely to be redressed by a favorable decision from the Court. *Burke v. City of Charleston*, 139 F.3d 401, 405 (4th Cir. 1998)(*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992).

Defendants contend that Plaintiffs' alleged damages of $30,000 are too speculative to constitute injury and that any actual losses suffered by the newspapers stem from unrelated business matters. (Defs.' Resp. to Pls.' Mot. Summ. J. 6.) This allegation, however, too strictly defines the notion of actual injury. The *Collegiate Times* and *The Cavalier Daily* attest to at least six occasions on which they turned away prospective advertisers because of 3 VAC 5-20-40(B)(3). (Defs.' Mem. Supp. Mot. Summ. J., Encl. VII, Slaven Dep. 18-21; Encl. XI, ¶ 6.) Plaintiffs concede that they cannot provide specific information regarding the size, quantity, frequency, or price of such desired advertisements. (Defs.' Mem. Supp. Mot. Summ. J., Encl. VI, Wolff Dep. 17-21, 24-25, 30; Encl. VII, Slaven Dep. 18-21.) Plaintiffs, however, earn the bulk of their revenue from advertising. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 7; Ex. 2, Slaven Decl. ¶ 9.) The *Collegiate Times* articulates a specific amount of monetary loss with respect to one advertisement. (Pls.' Reply Supp. Mot. Summ. J., Ex. 10, Wolff Supp. Decl. ¶ 4.) As a result, any lost advertisements constitute some lost revenue and, more importantly, lost opportunity. *See The Pitt News v. Fisher*, 215 F.3d

354, 360 (3d Cir. 2000) (holding that newspaper had "personal stake" to confer standing because it had lost advertising revenue as a result of challenged regulation).

The absence of specific calculation of loss does not diminish the injuries Plaintiffs suffered. Plaintiffs' failure to offer a precise monetary loss does not alleviate the proffered injury. *See Virginia v. Hicks*, 539 U.S. 113, 121 (2003)(finding that the Commonwealth had suffered an actual injury simply by being unable to prosecute a criminal defendant). Their injuries actually occurred and are not contemplative of future events. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)(finding no standing where plaintiff feared that, in a future encounter with police, the officers might administer a chokehold). In addition, the Plaintiffs unambiguously plead constitutional injury by asserting infringement upon their freedoms of speech. *See Miller v. Brown*, 462 F.3d 312, 316-17 (4th Cir. 2006)(noting that stating a claim of violation of the right to freely associate constituted sufficient constitutional injury to confer standing).[5]

Plaintiffs' injuries can be fairly traced to the regulations at issue and are likely to be redressed by a favorable decision from this Court.

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[5] In the context of a preliminary injunction, the Supreme Court of the United States has explained that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

In sum, the lost advertisements constitute an allegation of sufficient actual injury to confer standing upon the *Collegiate Times* and *The Cavalier Daily*.

B. Merits

It is well settled that speech that does "no more than propose a commercial transaction" is protected by the First Amendment. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976)(internal citation omitted). "The commercial market place ... provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). This so-called "commercial speech," however, enjoys protection only proportionate to its "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). Accordingly, commercial speech is regulated in a manner that might be impermissible for noncommercial speech. *Id.*

In this case, the parties agree that the Supreme Court's *Central Hudson* framework governs this dispute. (Pls.' Mem. Supp. Mot. Summ. J. 9; Defs.' Mem. Supp. Mot. Summ. J. 17.) In *Central Hudson*, the Court set forth a four-part test for evaluating restrictions on commercial speech. *Cent. Hudson Gas & Elec.*

Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566(1980).

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id.

In this analysis, the Government bears the burden of identifying a substantial interest and justifying the challenged restriction. *Edenfield*, 507 U.S. at 770. The Court shall apply this test to each of the regulations at issue.

1. <u>Generally Applicable Regulation: 3 VAC 520-40(A)</u>

The first regulation, 3 VAC 5-20-40(A), does not restrict its applicability to any particular audience. Instead, it applies generally to all "print or electronic media." 3 VAC 5-20-40(A). This regulation allows advertisements to reference beer or wine. *Id.* The regulation allows reference to mixed beverages only if the following words are used: "Mixed Drinks," "Exotic Drinks," "Polynesian Drinks," "Cocktails," "Cocktail

Lounges," "Liquor," or "Spirits." 3 VAC 5-20-40(A)(l). In terminology reflecting that it has "been in effect since the repeal of Prohibition in 1933," (Defs.' Mem. Supp. Mot. Summ. J. at 5), the words "Bar," "Bar Room," "Saloon," "Speakeasy," or similar references may not be used unless they are combined with words that connote a restaurant and they are part of the trade name. 3 VAC 5-20-40(A)(2). Finally, 3 VAC 5-20-40 prohibits use of the term "Happy Hour" or similar terms in advertisements. 3 VAC 5- 20-40(A)(3).

a. Mootness

Instead of addressing constitutionality on the merits, Defendants simply state that the regulation "is no longer at issue." (Defs.' Resp. to Pls.' Mot. Summ. J. 12.) Defendant W. Curtis Coleburn, III, testified that the ABC Department has not enforced 3 VAC 5-20-40 since the filing of the instant suit. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 6, Coleburn Dep. 14; Defs.' Resp. to Pls.' Mot Summ. J. 12.) He also testified that the ABC Department intends to implement a committee to examine the advertising regulations, but the committee has not yet been named nor has a timeline been selected. (*Id.* at 14-15.) The regulation, however, remains promulgated in the Virginia Administrative Code.

This Court does not agree that the voluntary cessation of enforcement, even with intent to reconsider the merits of the regulation, renders 3 VAC 5-20-40(A) moot. *See Friends of the Earth,*

Inc. v. Laidlaw Envtl Servs., Inc., 528 U.S. 167, 189 (2000)(noting the stringency of the mootness standard and placing a heavy burden to demonstrate that challenged conduct cannot reasonably be expected to reoccur). Defendants could elect to enforce 3 VAC 5-20-40 at any time. Moreover, any intention to repeal the regulation is, at best, speculative. Because the ABC Department could be reasonably expected to enforce the regulation in the future, 3 VAC 5-20-40 remains a viable issue.

b. *Central Hudson* Test for Constitutionality

Applying the *Central Hudson* test to this regulation, this Court finds it to violate the First Amendment. First, alcohol advertising is "protected by the First Amendment," as it is lawful and no evidence exists that the text is misleading. *Cent. Hudson*, AA1 U.S. at 566. While it is illegal for a segment of the population to consume alcohol, the product itself is not unlawful or contraband for the purposes of First Amendment protection. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) ("[T]here is no question that Rhode Island's price advertising ban [on alcohol] constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product").

Scant evidence exists that this regulation serves a substantial governmental interest, the second *Central Hudson* prong. *Cent. Hudson*, 447 U.S. at 566. The first subsection, 3 VAC 5- 20-

40(A)(l), permitting only certain terms pertinent to mixed beverages, seeks to "discourage the consumption of distilled spirits." (Pls.' Mem. Supp. Mot. Summ. J., Ex. 6, Coleburn Dep. 11.) The second subsection, 3 VAC 5-20-40-(A)(2), seeks to avoid the promotion of bars or "watering holes." (*Id.*) The third subsection, 3 VAC 5-20-40(A)(3), prohibits the term "Happy Hour" in order to "encourage temperance," to avoid enticing otherwise abstemious individuals into consuming inexpensive alcohol. (*Id.* at 12.)

Assuming, without deciding, that temperance is a substantial governmental interest,[6] the Court simply cannot find that the regulation meets the third prong. Specifically, the regulation does not directly advance the governmental interest asserted. *Cent. Hudson*, 447 U.S. at 566. The litany of permitted words in 3 VAC 5-20-40(A)(l) does not directly advance the goal of temperance or diminished consumption of distilled spirits. Defendants present little evidence about this regulation at all, much less evidence to explain why generic phrases such as "Mixed Drinks," "Exotic Drinks," or even "Polynesian Drinks" are more temperate than drink- or brand-specific phrases. As for 3 VAC 5-

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[6] "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." 44 *Liquormart*, 517 U.S. at 503. In 44 *Liquormart*, however, the parties conceded that the second prong of *Central Hudson* was met, so the Court did not pass judgment on whether temperance constituted such an interest. *Id.* at 529 (O'Connor, J., concurring).

20-40(A)(2), the ABC Department cannot seek to discourage bars when in fact, the ABC Department concedes that "we don't have bars in Virginia." (Pls.' Mem. Supp. Mot. Summ. J., Ex. 6, Coleburn Dep. 11.) Although the parties do not comment directly on the point, the Court notes that "speakeasies" likely don't exist in Virginia anymore, either. Direct regulation mandates that only restaurants may obtain "on premises" liquor licenses. (*Id.*) Defendants also fail to present proper evidence that prohibition of the term "Happy Hour" in print or electronic advertisements, forbidden by 3 VAC 5-20-40(A)(3), advances the goal of encouraging temperance. These events may be advertised by radio, television, or even by signage at an establishment. In the absence of evidence to meet the third prong, this Court shall not consider the fourth prong of the *Central Hudson* test.

2. Applicable Regulation to College Student Publications: 3 VAC 5-20-40(B)(3)

The second regulation, 3 VAC 5-20-40(B)(3), applies only to "college student publications." Updated in the 1970's and early 1990's when the drinking age changed, the second regulation prohibits College student publications from advertising for "beer, wine and mixed beverages," unless made in reference to a dining establishment. The advertisements may not contain "any reference to particular brands or prices" and are limited to use of the following words: "A.B.C. on-premises," "beer," "wine,"

"mixed beverages," "cocktails," or any combination of these words. 3 VAC 5-20-40(B)(3). The constitutionality of this regulation, or any similar statute, appears to be an issue of first impression in courts of the United States Court of Appeals for the Fourth Circuit. Plaintiffs claim that 3 VAC 5-20-40(B) violates both their freedom of speech under the First Amendment and unjustifiably imposes a financial burden on a particular segment of the media.

a. *Central Hudson* Test for Constitutionality

i. First Amendment Protection

Defendants argue that alcohol advertisements in college student publications do not pertain to lawful activity and, as a result, are not protected by the First Amendment. (Defs.' Mem. Supp. Mot. Summ. J. 17-18.) Their contention focuses on the argument that the publications are directed at a population with an "unusually high *concentration* of underage persons."[7] (*Id.* at 18)(emphasis in original.) The activity is unlawful for the underage people who read the advertisements. Nevertheless, the parties agree that the majority of readers of the *Collegiate Times* and *The Cavalier Daily* are over the age of twenty-one. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff

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[7] The sale of alcoholic beverages to persons under the age of 21 is unlawful Virginia. Va. Code § 4.1-304. The purchase, possession, or consumption of alcoholic beverages by persons under the age of 21 also is unlawful in Virginia. Va. Code § 4.1-305.

Decl. ¶ 5, Attach. A; Defs.' Mem. Supp. Mot. Summ. J., Encl. IV, Rue Aff. ¶¶ 3-4; Encl. XI, ¶ 1.)

In response, Plaintiffs cite several cases for the proposition that alcohol and similar products, which are illegal for only a segment of the population, are lawful products for the purposes of First Amendment protection. (Defs.' Resp. to Pls.' Mot. Summ. J. 7-8.) Although this Court finds that the expression at issue meets the first prong of the *Central Hudson* test, it does so on a more narrow reading of precedent than Plaintiffs suggest.

Plaintiff first relies on Lorillard, where the Supreme Court considered the constitutionality of a state's ban on outdoor tobacco advertising within the vicinity of schools and playgrounds. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). However, the majority opinion does not consider the entirety of the *Central Hudson* test, stating that "[o]nly the last two steps ... are at issue here." *Id.* at 555. Plaintiff cites a portion of Justice Thomas's concurrence, in which he notes that the State raised a similar issue as Defendants raise here. "[The State] argue[s] that the regulations restrict speech that promotes an illegal transaction — i.e., the sale of tobacco to minors." *Id.* at 577 (Thomas, J., concurring). Justice Thomas explicitly noted that the theory was not properly before the Court, because the parties "did not urge their theor[y] in the lower courts." *Id.* at 577-78. As such, the Supreme Court did not consider whether tobacco advertisements near schools and playgrounds

communicated lawful transactions warranting First Amendment protection.

Plaintiffs' next source of support similarly must be circumscribed. The Fourth Circuit considered the first prong of the *Central Hudson* test only in dicta when it evaluated Baltimore's prohibition on the placement of stationary alcohol advertising in publicly visible locations. *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1313 (4th Cir. 1995), *aff'd in part after remand*, 101 F.3d 325 (4th Cir. 1996). The Fourth Circuit observed that the parties' "principal challenge" to Baltimore's regulation pertained to the third and fourth prongs of *Central Hudson*. *Id.* at 1311. Before progressing to the heart of the discussion, the Court commented that the first prong of *Central Hudson* was not disputed because "the purchase and consumption of alcoholic beverages are generally lawful." *Id.* at 1313.

Plaintiffs also cite *The Pitt News v. Pappert*, a case from the United States Court of Appeals for the Third Circuit. 379 F.3d 96 (3d Cir. 2004). Then-Circuit Judge Alito authored the opinion striking down a state statute prohibiting all paid alcohol advertising in educational institution publications. While the bulk of the Court's analysis pertained to the third and fourth prongs of the *Central Hudson* test, then-Judge Alito offered the following remark about the lawfulness of the regulation: "[T]he law applies to ads that concern lawful activity (the lawful sale of alcoholic beverages) and that are not misleading, and we see no other ground on which it could be

argued that the covered ads are outside the protection of the First Amendment." *Id.* at 106.

This Court is persuaded by the observations of the Fourth and Third Circuits. The first prong of the *Central Hudson* is not solely lawfulness, but rather whether the speech is "protected by the First Amendment." *Cent. Hudson*, 447 U.S. at 566. Lawfulness and truthfulness are merely the minimal requirements for this inquiry. *Id.* Here, the proposed commercial transaction is not inherently unlawful, as is the sale of narcotics or other contraband. Moreover, the parties agree that at least 50% of the readers of Plaintiffs' newspapers are of legal age to purchase alcohol. Defendants present no evidence that these advertisements specifically target readers under the age of 21. Nor do the parties present any evidence that the advertisements in question are misleading. This Court finds that the expression suppressed is protected by the First Amendment and the first prong of the *Central Hudson* test is met.

ii. Substantial Government Interest

The second prong of the *Central Hudson* test requires that the asserted governmental interest be substantial. *Cent. Hudson*, 447 U.S. at 566. Defendants claim that the reduction of underage and over-consumption of alcohol on college campuses is the interest this regulation seeks to advance. (Defs.' Mem. Supp. Mot. Summ. J. 19-20.) The Plaintiffs concede, for the purposes

of summary judgment, that this interest is substantial. (Pls.' Mem. Supp. Mot. Summ. J. 9.) This Court agrees that this constitutes a substantial governmental interest. Accordingly, the second *Central Hudson* prong is met.

iii. Direct Advancement

To satisfy the third prong of the *Central Hudson* test, the government bears the burden of demonstrating that the regulation directly advances the governmental interest asserted. *Cent. Hudson*, All U.S. at 566. Direct advancement requires that the regulation "alleviate" the substantial interest "to a material degree." Lohllard, 533 U.S. at 555; *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173,188 (1999); *Edenfield*, 507 U.S. at 771. Evidence necessary for this showing may range from "'studies and anecdotes ... [to] simple common sense.'" *Lorillard*, 533 U.S. at 555 (*quoting Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995). "Mere speculation or conjecture" or "remote support," however, will not suffice. *Edenfield*, 507 U.S. at 770.

Defendants appear to advocate a subjective overlay onto this test, urging this Court to evaluate the reasonableness of the belief that the regulation directly advances the governmental interest. (Defs.' Mem. Supp. Mot. Summ. J. 23; Defs.' Resp. to Pls.' Mot. Summ. J. 8.) Defendants rely on the series of Anheuser-Busch cases from this Circuit to support this contention. A discussion of these cases ensues.

The *Anheuser-Busch* Cases

In 1993, the city of Baltimore enacted a ban on the display or advertisement of alcoholic beverages on billboards in publicly visible locations. *Anheuser-Busch, Inc., v. Mayor & City Council of Baltimore City*, 855 F. Supp. 811, 813 (D. Md. 1994). A brewing company and billboard company facially challenged the constitutionality of this ordinance. *Id.* The District Court of Maryland upheld the regulation, finding that it adequately met the *Central Hudson* test. *Id.* at 822. On appeal, the Fourth Circuit affirmed the decision, specifically considering the third and fourth prongs of *Central Hudson*. *Anheuser-Busch, Inc., v. Schmoke*, 63 F.3d 1305, 1318 (4th Cir. 1995)("*Anheuser I*"). The Fourth Court affirmed commenting on the research and studies presented to the City Council before enactment, the majority of which "show[ed] a definite correlation between alcoholic beverage advertising and underage drinking." *Id.* at 1314. The City Council also found that outdoor advertising to be a "unique and distinct medium" that invites the public, especially children, to "involuntary and unavoidable solicitation." *Id.* Relying in part on *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Fourth Circuit gave deference to legislative judgment when making its determination. *Id.* at 1314. The court found the regulation valid because of the "reasonableness of the legislature's belief that the means it selected will advance its ends." *Id.* at 1314-15.

After this decision, the Supreme Court decided *44 Liquormart, Inc. v. Rhode Island*, in which the Court placed doubt on the validity of *Posadas de Puerto Rico Associates*. 517 U.S. at 509-13. In a fragmented opinion, *44 Liquormart* struck down Rhode Island's broad ban on advertising of alcohol prices. *Id.* at 516. Less than two months later, the Supreme Court granted a petition for writ of certiorari in *Anheuser* I. *Anheuser-Busch v. Schmoke*, 517 U.S. 1206 (1996). The Court remanded for further consideration in light of *44 Liquormart*. *Id.*

Upon reconsideration, the Fourth Circuit affirmed the district court's judgment and readopted its earlier decision. *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d at 327 ("*Anheuser II*"). The Fourth Circuit disclaimed its previous reliance on *Posadas de Puerto Rico Associates*, finding that its "own independent assessment" determined that Baltimore's ban "directly and materially" advanced the city's interest in "promoting the welfare and temperance of minors." *Id.* at 327. The Fourth Circuit re-evaluated the evidence the City Council considered when enacting the legislation, and found reasonable the Council's decision that a correlation existed between alcohol ads and underage drinking. *Id.* The *Anheuser* court also distinguished Baltimore's ban from that at issue in *44 Liquormart*, highlighting Baltimore's interest in "protecting] children" compared to Rhode Island's "desire to enforce adult temperance." *Id.* at 329.

Reasonableness under the Third Prong

This Court cannot adopt the Defendants' refracted version of the third prong test for several reasons. First, it seems clear to the Court that the reasonableness of the legislature's belief no longer drives the examination. The language from *Anheuser I* on which Defendants rely largely pertains to the Court's obligation to assess the reasonableness of the government's enactment of the legislation. (Defs.' Mem. Supp. Mot. Summ. J. 22.) Though the Fourth Circuit declined to specifically disclaim these conclusions in *Anheuser II*, they appear to be grounded in jurisprudence from *Posadas de Puerto Rico Associates*, which was disclaimed. *Anheuser II*, 101 F.3d at 327 n.l. Also, in *Anheuser II*, the Fourth Circuit twice confirmed that it was making its own "independent" assessment regarding the advancement. *Id.* at 327 & n.l.

Second, *Pitt News*, a factually analogous case from the Third Circuit, confirms that other courts read the Supreme Court test more narrowly than Defendants suggest. 379 F.3d 96. In striking down the blanket ban on all paid alcohol advertisements in college publications, then- Judge Alito noted that the state failed to meet its burden of proving "a material degree" of advancement. *Id.* at 107 (quotation omitted). Even if college students did not see the alcohol ads in the college newspaper, "they will still be exposed to a torrent of beer ads on television and the radio, and they will still see alcoholic beverage ads in other publications, including the

other free weekly ... papers that are displayed on campus." *Id.* "*Anheuser II*" itself rested on a finding that the regulation directly and materially advanced the governmental interest. 101 F.3d at 327.

Third, the record before this Court is virtually bereft of evidence as to the precise rationale of Virginia's ABC Board at the time of 3 VAC 5-20-40(B)(3)'s enactment or altering.[8] Unlike *Anheuser II*, the Defendants here present no record that the ABC Board considered the findings of Dr. Saffer or any other researchers. Indeed, the Board could not have, because all the data before the Court post-dates the regulation's enactment. This *post hoc* presentation of the record does not explain the conduct of the regulatory board when considering its action, which is the traditional anchor on which the reasonableness evaluation rests. This Court simply does not see any guiding precedent allowing after-created studies to justify an earlier restriction on protected commercial speech.

The evidence regarding the efficacy of 3 VAC 5-20-40(B)(3).

However, even presuming the "*Anheuser II*" call for a court to make its own independent judgment controls the procedure to be undertaken

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[8] At the Court's request, Defendants submitted documents as to any hearings held. Those documents are scant, and do not illuminate the decision-making process to a significant degree, if at all.

here, the regulation founders on the record. In this case, Defendants present the testimony of one expert, three administrators, the COO of the ABC Department, and a mountain of statistics regarding the serious phenomenon of underage and abusive drinking on college campuses. Expert Dr. Saffer's research culminates in the findings that (1) alcohol advertising increased highway fatalities in subjects between the ages of 18-20, and (2) a reduction in alcohol advertising would reduce alcohol participation and binge drinking. (Defs.' Mem. Supp. Mot. Summ. J., Encl. III, Saffer Decl. ¶¶ 16-17.) He agrees that alcohol advertising bans reduce alcohol consumption only when no reasonable substitute for the banned media exists. (Defs.' Mem. Supp. Mot. Summ. J., Encl. X, Saffer Dep. 8.) The cornerstone of Dr. Saffer's opinion is that a college student newspaper is a unique sort of media for which no substitute media exists. (*Id.* at 9.) A ban on alcohol advertising in college newspapers, therefore, would reduce alcohol consumption because advertisers would not be able to reach college students in a similar manner. (*Id.* at 9-10.)

At the outset, the Court does not dispute the general proposition that advertising increases demand, while suppressed advertising may have the opposite effect. *Lorillard*, 533 U.S. at 557; *see also Cent. Hudson*, 447 U.S. at 569 ("There is an immediate connection between advertising and demand for [the advertised product]. [Plaintiff] would not contest the advertising ban unless it believed that promotion would increase its sales.").

Nor does the Court take lightly the severity of the problem. Defendants' three college-based administrators pointedly lay out the scourge presented by misuse of alcohol at UVA and Virginia Tech. Nationwide, "80 percent of college students drink alcohol, about 40 percent engage in binge drinking, and about 20 percent engage in frequent episodic heavy consumption, which is binging three or more times over the past two weeks." (Defs.' Resp. to Pls.' Mot. Summ. J., Encl. I, Ex. C (*The Surgeon General's Call to Action To Prevent and Reduce Underage Drinking* (HHS 2007)) at 12-13.) "An estimated 1,700 college students between the ages of 18 and 24 die each year from alcohol-related unintentional injuries, including motor vehicle crashes." (*Id.* at 13.) "Approximately 700,000 students are assaulted by other students who have been drinking," and "[a]bout 100,000 students are victims of alcohol-related sexual assault or date rape." (*Id.*) Dean Rue, and Directors Keene and Bruce, explain the multifaceted and environmental strategies undertaken by the universities to educate about abstinence, responsible alcohol use, and the devastation caused by binge drinking. COO Coleburn touts a similar approach in his affidavit.

It is clear to the Court that 3 VAC 5-20-40(B)(3) seeks to mitigate a significant problem throughout the Commonwealth and the nation as a whole. However, all of the findings before the Court, which show an increasing problem with drinking behavior on college campuses, post date the enactment of the regulation at issue. Even presuming the Court could evaluate a 1970's

regulation based solely on its performance in the years after 2000, not a single witness testifies as to how this regulation, which has been in effect for decades, has directly advanced the admittedly substantial governmental interest of preventing underage consumption of alcohol or abusive drinking. Nor have they said how it has alleviated the problem. All administrators and COO Coleburn emphasize that studies support the use of the environmental, multi-pronged strategy they have in place.

While common sense alone confirms the beneficial use of a multi-pronged strategy, Plaintiffs challenge a facet of that strategy that suppresses commercial speech protected under the First Amendment. That aspect of the approach must be evaluated under existing constitutional principles. In this record, each administrator and Coleburn opine only that "3 VAC 5-20-40(B) *will effectively assist*" in their institution's efforts to prevent or reduce "the consumption of alcoholic beverages by those students under the age of 21 and the over consumption of alcoholic beverages" by college students.[9] (Defs.' Mem. Supp. Mot. Summ. J., Encl. I, Keene Aff. ¶ 23; Encl. II, Bruce Aff. ¶ 8; Encl. IV, Rue Aff. ¶ 13; Defs.' Resp. to Pls.' Mot. Summ. J., Encl. I, Coleburn Aff. ¶ 9.) (emphasis

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[9] The Court notes that these individuals likely do not qualify to offer expert opinions under Fed. R. Evid. 701. Because their opinions, even if considered, do not support a finding of constitutionality, the Court need not address that issue definitively.

supplied.) They do not aver that it already has done so.

The silence on the record as to any effect of the existing regulation presents this Court with an insurmountable barrier in upholding its constitutionality. Even presuming that the Court's evaluation of the efficacy of the regulation should begin based on current information, the record leaves out the most telling factual evidence that could undergird the assessment: any effect of this very regulation in the past. Defendants present no evidence of any study of the regulation itself. They present no information about how drinking behavior at Virginia Tech and UVA compares to behavior at campuses not subject to any advertising restriction, or subject to greater prohibition. Dr. Saffer testified that he is unaware of any empirical study indicating that campuses with a ban on campus advertising of alcohol have a lower incidence of underage or binge drinking.[10] (Pls.' Mem. Supp. Mot. Summ. J., Ex. 7, Saffer Dep. 18-19.) Susan Bruce testified that she is not aware of any scientific research showing that prohibitions on alcohol advertising in college publications are effective at addressing underage or binge drinking. (Defs.' Mem. Supp.

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[10] Dr. Nelson's opinions rest in part on this lack of information. Dr. Nelson's opinion that 3 VAC 5-20-40 cannot substantially or materially reduce underage or abusive drinking stems in part from his criticism of the lack of data specific to college students or advertisements in college publications. (Pls.' Mem. Supp. Mot. Summ. J., Ex.4, Nelson Rebuttal Decl.)

Mot. Summ. J., Encl. VIII, Bruce Dep. 24.) Steven Clarke, the Director of the Campus Alcohol Abuse Prevention Center at Virginia Tech, also testified that he was unaware of any scientific evidence specifically relating to the efficacy of a prohibition on alcohol advertising in college publications. (Pls. Mem. Supp. Mot. Summ. J, Ex. 9, Clarke Dep. 20.) Nothing on this record suggests that the vexatious circumstance regarding drinking at UVA or Virginia Tech would be worse, i.e. that the regulation alleviated directly the problem to a material degree, had VA 3-5-20-40(B)(3) not been in place.

Moreover, if 3 VAC 5-20-40(B)(3) prevented Virginia college students from observing *any* alcohol advertisements, this Court might find the third prong of the *Central Hudson* better addressed. However, as then-Judge Alito noted in *Pitt News*, even given restrictions on ads in college publications, college students are bombarded by advertisements from sources other than college newspapers, including other papers available to the same college population. Dr. Saffer agrees that alcohol advertising bans reduce alcohol consumption only when no real substitute for the banned media exists. His testimony, though, that college papers are so unique that no media substitute exists simply does not persuade. Dr. Saffer offers no rationale or evidence, beyond conjecture, to support his claim as to the singularity of a college publication. Even presuming an unusually high concentration of underage readers, his insight ignores the common sense reality that college students now live in a

multimedia environment including television, radio, and other periodicals, all of which display uncensored alcohol advertisements. Presumably, all of those underage drinkers are exposed to the substitute media, as observed by the court in *Pitt News*. Dr. Saffer's opinion ignores the vast world of electronic media and the internet, which common sense suggests might act as a substitute source of far more information to college students than does any newspaper.[11]

It has been noted that a legislature rarely seeks "to restrict speech about an activity it regarded as harmless or inoffensive. Calls for limits on expression are made when the specter of some threatened harm is looming." *Lorillard*, 533 U.S. at 590 (Thomas, J., concurring.) Regardless of the issue addressed, a court or a legislature must adhere to First Amendment principles. Because Defendants do not provide evidence that 3 VAC 5-20-40(B)(3) alleviates or advances the substantial interests asserted to a material degree, the regulation does not meet the third prong of the *Central Hudson* test.

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[11] When asked what types of media college students generally are exposed to, Susan Bruce replied, "Internet mostly." (Pls.' Mem. Supp. Mot. Summ. J, Ex. 8, Bruce Dep. 30.) Steve Clarke confirmed that college student exposure to print media is "probably limited" and that the internet and television are likely primary sources of information for students. (Pls.' Mem. Supp. Mot. Summ. J, Ex. 9, Clarke Dep. 21.)

iv. Narrowly Tailored

The fourth prong of the *Central Hudson* test requires a "reasonable fit between the means and ends of the regulatory scheme." *Lorillard*, 533 U.S. at 561 (*citing Cent. Hudson*, 447 U.S. at 569). This fit need not be perfect but rather reasonable, representing "not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (quotation omitted). Some "latitude" in fit exists. *Anheuser II*, 101 F.3d at 327. This Court finds that regulation 3 VAC 5-20-40(B)(3) is more extensive than necessary to serve the interests of preventing underage and abusive drinking. *Cent. Hudson*, 447 U.S. at 566.

In arguing that the regulation is not narrowly tailored, Plaintiffs present evidence of the myriad other ways to address these interests. Defendants' own expert, Dr. Saffer, concedes that increased alcohol taxation and counteradvertising also will reduce underage drinking on college campuses. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 7, Saffer Dep. 19-20.) Indeed, Dr. Saffer states that, "[i]creased taxation is more effective than advertising bans" in combating underage and binge drinking.[12] (*Id*, Saffer Dep. 22.) Defendants'

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[12] In *Pitt News*, when addressing the proper means to pursue the government's interest, the Third Circuit rested its decision in part on the finding that increased law enforcement of alcohol beverage control laws on college campuses would be more effective than an advertising ban. 379 F.3d at 108. Defendants here suggest that increased

suggest that their comprehensive approach, in which this regulation is merely one component, best combats the problems of underage and over-consumptive drinking. (Defs.' Reply 6; Defs.' Resp. to Pls.' Mot. Summ. J., Encl. I, Ex. C.) Defendants present extensive evidence of the educational and rehabilitative measures already taken at Virginia Tech and UVA. (Defs.' Mem. Supp. Mot. Summ. J., Encl. I, Keene Aff. ¶¶ 13- 14, 22; Encl. II, Bruce Aff. ¶¶ 4-7.) The Court applauds this comprehensive approach and acknowledges that the presence of other means of accomplishing these interests does not deem the regulation over extensive.

However, any fit must, in fact, be tailored, because the facet Defendants manipulate here invokes First Amendment principles. Although the test of reasonableness presents a closer case, the retrospective gloss offered by Defendants does not fully explain the breadth of 3 VAC 5-20-40(B)(3). Defendants contend that "tailoring is evident on the face of the regulation," because only certain words are prohibited under 3 VAC 5-20-40(B)(3). (Defs.' Mem. Supp. Mot. Suram. J. 26.) This ban on specific words, they argue, distinguishes the case from *Lorillard*. In *Lorillard*, the Supreme Court held that, inter alia, regulations prohibiting the outdoor

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law enforcement exists on their campuses as part of their comprehensive approach. Without definitively finding, the Court presumes that law enforcement of ABC laws is part of the environmental approach employed by Defendants.

advertising of smokeless tobacco or cigars within 1,000 feet of a school or playground were not narrowly tailored. 533 U.S. at 565-66. The Court reached this decision based, in part, upon the fact that the regulations prohibited advertising in a substantial portion of Massachusetts' major metropolitan areas. *Id.* at 562. In fact, in some areas, the regulations would have constituted "nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers." *Id.*

Though 3 VAC 5-20-40(B)(3) restricts only certain words, it broadly affects all readers of college newspapers in the Commonwealth of Virginia. Because the regulation is over inclusive, it prohibits adult readers - who comprise the majority of readers of the *Collegiate Times* and *The Cavalier Daily* - from receiving the communications. (Pls.' Mem. Supp. Mot. Summ. J., Ex. 1, Wolff Decl. ¶ 5, Attach. A; Defs.' Mem. Supp. Mot. Summ. J., Encl. IV, Rue Aff. ¶¶ 3-4; Encl. XI, ¶ 1.); see *Pitt News*, 379 F.3d at 108. Moreover, the basis for the word choice, or the restriction to ads associated with dining establishments, is not adequately explained in the record. While Defendants' contention that brand names offer potential for greater persuasion rings true, other restrictions are not explained. For instance, as written, the regulation prohibits an academic department from advertising an on-campus wine and cheese reception honoring a visiting or distinguished scholar. A "champagne" brunch also might violate the ban. Defendants' witnesses do not articulate a consistent basis for

the limitations, and they cannot link them to considerations the ABC Board weighed when enacting the regulation because the record on that is essentially silent. The Supreme Court has recognized that alcohol manufacturers and distributors "have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information" about those products. *Lorillard*, 533 U.S. at 564.

This case also is factually distinguishable from *Anheuser I* and *II*, which predate *Lorillard*. In *Anheuser*, Baltimore received testimony and evidence about advertising and decreased underage drinking before enacting the ordinance. *Anheuser I*, 63 F.3d at 1309. Baltimore had received studies demonstrating a "definite correlation" between alcoholic advertising and underage drinking. *Id.* Here, the record lacks similar evidentiary findings before the enactment of 3 VAC 5-20-40(B)(3), and the expert testimony before this Court conflicts. The Baltimore ordinance also applied uniformly to an entire medium of communication, whereas 3 VAC 5-20-40(B)(3) applies only to the narrow segment of college newspapers. Finally, Baltimore, as well as the Fourth Circuit, observed the unique nature of billboards and their audiences. Children are exposed to billboards "simply by walking to school or playing in their neighborhood." *Id.* at 1314; *see also Packer Corp. v. Utah*, 285 U.S. 105,110 (1932) (noting that billboards are "seen without the exercise of choice or volition," and viewers have the message "thrust upon them by all the

arts and devices that skill can produce"). Ads embedded within a college newspaper, though meant to persuade, are not "thrust upon" college students in a similar manner, nor does the college age reader necessarily need the level of protection afforded the younger age group contemplated by the *Anheuser* courts, even given concerns about alcohol misuse.

In sum, although the finding is closer given the latitude of the test applied, Defendants have not presented adequate evidence that 3 VAC 5-20-40(B)(3) is narrowly tailored to address the interests asserted and, as a result, the regulation fails the fourth prong of the *Central Hudson* test.

b. Constitutionality of Burden on One Segment of the Media

The parties places less emphasis on Plaintiffs' second argument, that 3 VAC 5-20-40(B)(3) also violates the First Amendment in that it "unjustifiably target[s] a specific segment of the media," that being media associated with colleges and universities. (Pls.' Mem. Supp. Mot. Summ. J. 16.) Defendants oppose this claim only by stating that the strict scrutiny advocated by Plaintiffs should not pertain in commercial speech cases. (Defs.' Resp. to Plfs.' Mot. Summ J. 11-12.)

Plaintiffs principally rely on *Pitt News* when making this argument. The Third Circuit examined several cases from the Supreme Court and discerned that a law is "presumptively invalid" if it singles out "a small group of speakers" for financial burden. *Pitt News*, 379

F.3d at 111 (internal citations omitted). Once this presumption arises, the *Pitt News* court found that it could be overcome only by the government producing a compelling reason for the challenged law. *Id.* In making this finding, the Third Circuit evaluated Supreme Court jurisprudence involving the imposition of taxes on certain segments of the press in a manner that might affect their First Amendment activities. *See Leathers v. Medlock*, 499 U.S. 439 (1991)(taxing cable television but not newspapers did not violate the First Amendment because did not attempt to interfere with First Amendment activities); *Ark Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987)(even absent motive to interfere, taxing general interest magazine but not certain other types of specialty magazines violated First Amendment); *Minneapolis Star & Tribune Co. v. Minn. Comm 'r of Revenue*, 460 U.S. 575 (1983)(even absent motive to affect content, taxing newspapers that used a certain amount of ink and paper violated First Amendment); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936)(taxing newspapers with certain circulation violated First Amendment, especially when meant to interfere with positions taken by newspapers).

Because this Court invalidates the regulations at bar under *Central Hudson*, it will not reach this secondary argument. The Court does so in part because even if 3 VAC 5-20-40(B)(3) imposes a cognizable financial burden on Educational Media Company and the Cavalier Daily, it is undecided in this Circuit how this burden pertains to a limit on commercial speech,

not the non-commercial speech at issue in the cases Pitt evaluated. Our Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Cent. Hudson*, 447 U.S. at 563. The Third Circuit's finding in *Pitt News*, though persuasive, is not binding on this Court. The Court declines to reach whether 3 VAC 5-20-40(B)(3) is unconstitutional as an unreasonable burden on a segment of the media.

C. Iniunctive Relief

Plaintiffs seek an order permanently enjoining Defendants from enforcing 3 VAC 5-20-40(A) and (B)(3). The briefing before this Court leaves this request for relief largely unaddressed.

The standard for issuing a permanent injunction requires a court to examine the following factors: (1) the likelihood of irreparable harm to the plaintiff without the injunction and whether the plaintiff has an adequate remedy at law; (2) the likelihood of harm to the defendant with an injunction; (3) whether the plaintiff has succeeded on the merits; and (4) the public interest. *Amoco Prod Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987); *Blackwelder Furniture Co. v. SeiligMfg. Co., Inc.*, 550 F.2d 189, 194 (4th Cir. 1977). An evidentiary hearing is not required before issuing a permanent injunction. *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 708 (4th Cir. 1999).

Because the Court has found 3 VAC 5-20-40(A) and (B)(3) to be unconstitutional, the Court

finds that the Plaintiffs have succeeded on the merits and that the public interest is not furthered by enforcing unconstitutional regulations. It appears an injunction should issue. However, the Court will afford the parties an opportunity to address any relief requested should they wish to do so. The parties shall contact the Court no later than five (5) days from the date of entry of this memorandum opinion and order to schedule a hearing on the issue of injunctive relief.

IV. Conclusion

In this case, it is clear that the Plaintiffs no more seek to support irresponsible drinking than the Defendants seek to eviscerate the First Amendment. Instead, the parties seek clarity under the laws and Constitution of the United States.

Having considered the pleadings, the exhibits, and the arguments of counsel, the Court concludes that no genuine issue of material fact exists and that, when applying existing precedent as articulated by the Supreme and other courts, Plaintiffs are entitled to judgment as a matter of law. The Court concludes as a matter of law that 3 VAC 5-20-40(A) and (B)(3) are facially unconstitutional because they violate the First Amendment as applied. The Court will deny Defendants' Motion for Summary Judgment, grant Plaintiffs' Motion for Summary Judgment, and will allow the parties five (5) days to schedule

a hearing on the issue of injunctive relief, should they desire one.

An appropriate Order shall issue.

/s/

United States Magistrate Judge

Richmond, Virginia

Date: March 31, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INC., and THE CAVALIER DAILY, INC.,

Plaintiffs,

v.

SUSAN R. SWECKER, *et al.*,

Defendants.

ORDER

This matter is before the Court on the parties' cross motions for summary judgment. Having considered the pleadings, the exhibits, and the arguments of counsel, the Court

concludes that no genuine issue of material fact exists and that Plaintiffs are entitled to judgment as a matter of law. The Court further concludes as a matter of law that 3 VAC 5-20-40(A) and (B)(3) are unconstitutional because they violate the First Amendment to the United States Constitution.

Accordingly, Defendants' Motion for Summary Judgment (Docket No. 18) is DENIED. Plaintiffs' Motion for Summary Judgment (Docket No. 16) is GRANTED. Regulations 3 VAC 5-20-40(A) and (B)(3), are declared unconstitutional.

The Court will allow the parties five (5) days to schedule a hearing on the issue of injunctive relief, should they desire one.

Let the Clerk send copies of this Order and the accompanying Memorandum Opinion to counsel of record.

It is so ORDERED.

/s/

United States Magistrate Judge

Richmond, Virginia

Date: 3/31/08

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INC., and THE CAVALIER DAILY, INC.,

Plaintiffs,

v. Civil Action No. 3:06CV396

SUSAN R. SWECKER, *et al,*

Defendants.

ORDER

For the reasons stated in this Court's March 31, 2008 Memorandum Opinion and Order, and in the accompanying Memorandum Opinion, the Court concludes as a matter of law that the challenged regulations, 3 VAC 5-20-40(A) and (B)(3), are facially unconstitutional because they violate the First Amendment to the United States Constitution.

Accordingly, having granted Summary Judgment to Plaintiffs, the Court hereby Orders that a Permanent Injunction issue against the enforcement of 3 VAC 5-20-40(A) and (B)(3).

Let the Clerk send copies of this Order and the accompanying Memorandum Opinion to counsel of record.

And it is so ORDERED.

____/s/_____

United States Magistrate Judge

Richmond, Virginia
Date: June 19, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INC., and THE CAVALIER DAILY, INC.,

Plaintiffs,

v. Civil Action No. 3:06CV396

SUSAN R. SWECKER, *et al,*

Defendants.

MEMORANDUM OPINION

By Memorandum Opinion and Order dated March 31,2008 ("Mem Op."), this Court declared unconstitutional two regulations in the Virginia Administrative Code, 3 VAC 5-20-40(A)and VAC 5-20-40(B)(3). Because of the paucity of commentary on the record as to remedy, the Court allowed the parties to address that issue separately. The parties have briefed the issue, the Court heard argument, and the matter is ripe for disposition. Having found the challenged regulations to be facially unconstitutional,[1] the

[1] Defendants express confusion based on an error on page 34 of the Memorandum Opinion which uses both the "facial" and "as applied" terminology. The Court now makes clear that, consistent with the remainder of the opinion, the "as applied" language should not have appeared.

Court will order that a permanent injunction issue against enforcement of both regulations.

I. The Challenged Regulations

1. Regulation 3 VAC 5-20-40(A)

Regulation 3 VAC 5-20-40(A)[2] pertains to all advertisements and reads as follows:

> A. Beer, wine and mixed beverage advertising in the print or electronic media is permitted with the following exceptions:
>
> > 1. All references to mixed beverages are prohibited except the following: "Mixed Drinks," "Mixed Beverages," "Exotic Drinks," "Polynesian Drinks," "Cocktails," "Cocktail Lounges," "Liquor" and "Spirits";
> >
> > 2. The following terms or depictions thereof are prohibited unless they are used in combination with other words that connote a restaurant and they are part of the licensee's trade name: "Bar," "Bar Room," "Saloon," "Speakeasy," or references or depictions of similar import; and

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[2] During argument, Defendants informed the Court that a notice to repeal this statute had been filed on May 26, 2008. Defendants suggested the regulation was moot. Nonetheless, Defendants pursued argument as to limited constitutional applications of the regulation, so the Court must address their argument.

3. Any references to "Happy Hour" or similar terms are prohibited.

2. **Regulation 3 VAC 5-20-40(B)(3)**

3 VAC 5-20-40(B)(3) pertains to advertisements in college publications and provides the following:

> 3. Advertisements of beer, wine and mixed beverages are not allowed in college student publications unless in reference to a dining establishment, except as provided below. A "college student publication" is defined as any college or university publication that is prepared, edited or published primarily by students at such institution, is sanctioned as a curricular or extra-curricular activity by such institution and which is distributed or intended to be distributed primarily to persons under 21 years of age.
>
> Advertising of beer, wine and mixed beverages by a dining establishment in college student publications shall not contain any reference to particular brands or prices and shall be limited only to the use of the following words: "A.B.C. on-premises," "beer," "wine," "mixed beverages," "cocktails," or any combination of these words. . . .

II. Analysis

A. Overbreadth

Defendants first suggest that the Court can declare the regulations at issue facially unconstitutional only by undertaking the overbreadth analysis in *United States v. Salerno*, 481 U.S. 739 (1981). To do so, Defendants step beyond the confines of earlier filings that rested solely on the four-part test for evaluating restrictions on commercial speech articulated in *Central Hudson. See Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm 'n*, 447 U.S. 557,566 (1980). (Defs.' Mem. Supp. Mot. Summ. J. 17.) Even presuming that this newly injected argument properly stands before the Court, Salerno and the other cases Defendants cite are inapposite.

Courts have applied the overbreadth doctrine only in non-commercial speech cases, and in cases outside the First Amendment altogether. See *Virginia v. Hicks*, 539 U.S. 113 (2003) (First Amendment facial challenge to trespass statute enacted by housing authority not based in commercial speech precepts); *Virginia v. Black*, 538 U.S. 343 (2003) (First Amendment facial challenge to cross burning statute not based in commercial speech statutes); *United States v. Salerno*, 481 U.S. 739 (1987) (Eighth Amendment facial challenge to Bail Reform Act). During oral argument, Defendants acknowledged that they could not offer a single case in which a court evaluated commercial speech utilizing an overbreadth analysis. The Court has found none.

Indeed, Central Hudson disavows such an analysis explicitly. See Cent. Hudson, 447 U.S. at 566 n.8 ("'This analysis is not an application of the 'overbreadth' doctrine."); see also *Vill. of Hoffman Estates v. Flipside, Hoffman Estates*, Inc., 455 U.S. 489, 497 (1982).

Defendants' assertion that the Court cannot declare the regulations facially unconstitutional outside a Salerno analysis also ignores existing caselaw. *Central Hudson* itself struck down a statute facially. *Cent. Hudson*, U.S. at 606 (Rehnquist, J., dissenting). In addition to *Central Hudson*, the United States Supreme Court appears to have facially struck down commercial speech statutes solely within the commercial speech analytical framework. *See Thompson v. W. States Med. Or.*, 535 U.S. 357 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). A permanent injunction also has issued on finding a regulation invalid as applied. The *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004).

The *Central Hudson* test binds this Court, and, as initially argued by both parties, must govern the review of the curb on commercial speech at issue here. This Court need not reconsider its March 31, 2008 ruling that the regulations are facially invalid.

B. Limited Constitutional Application

In any event, even if the Court undertook the analysis urged by Defendants, it must issue a

full permanent injunction. Citing principles from the overbreadth doctrine, Defendants urge this Court not to issue a full injunction, but instead to fashion a limited injunction retaining aspects of the regulations that can be applied constitutionally. Defendants urge the Court to fashion a more narrow injunction in the following manner:

> For example, 3 VAC 5-20-40(B)(3) is constitutional as applied to a college student publication whose readership is predominately under the age of 21.
>
> Similarly, 3 VAC 5-20-40(B)(3) is constitutional as applied to advertisements promoting the illegal sale of alcohol, such as an unlicensed establishment advertising the sale of alcohol on its premises.
>
> 3 VAC 5-20-20(A) [sic] is also capable of constitutional applications. For example, a restaurant that does not have an ABC license but serves alcohol is a "speakeasy" by definition. See Merriam-Webster Online Dictionary, 16 May 2008 (a place where alcoholic beverages are illegally sold). The regulation is constitutional as applied in that situation.

(Defs.' Br. 5-6.)

In an overbreadth analysis, the Supreme Court has held that "partial, rather than facial, invalidation is the required course ... [u]nless

there are countervailing considerations." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985); *see also Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1084 (4th Cir. 2006). Similarly, the United States District Court for the Eastern District of Virginia has held, "When certain words or subprovisions of a statute, as opposed to the statute in its entirety, are overbroad, a court may limit injunctive relief to the problematic words, phrases, or subprovisions." *Norfolk* 302, *LLC v. Vassar*, 524 F. Supp. 2d 728,741 (E.D. Va. 2007).

However, the preference for limited injunctive relief is subject to two qualifications. First, a limited injunction should not issue if the legislature would not have passed the act had it known the relevant provision to be invalid. *Brockett*, All U.S. at 506. Second, the courts should "impose a limiting construction... only if [the act] is 'readily susceptible' to such a construction." *Reno v. ACLU*, 521 U.S. 844, 884 (1997) (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383,397 (1988)); *PSINet, Inc. v. Chapman*, 362 F.3d 227,236 (4th Cir. 2004). Therefore, courts should not "rewrite a state law to conform it to constitutional requirements." *Am. Booksellers Ass'n, Inc.*, 484 U.S. at 397. A complex revision would encroach on the legislature's authority. *Id.* Courts should issue limited injunctions only if "the text or other source of [legislative] intent identifie[s] a clear line that [the courts can] draw.'" *PSINet*, 362 F.3d at 236 (quoting *Reno*, 521 U.S. at 884). In sum, a readily identifiable and separable part of the act must be constitutional.

1. **Regulation 3 VAC 5-20-40(A)**

As to the first challenged regulation, governing all advertisements and prohibiting use of specific references such as "Polynesian Drinks," "Cocktails," or "Spirits," Defendants contend the Court should fashion a limited injunction continuing the restriction against advertising the unlawful sale of alcohol, in part because a "speakeasy" is a place where such conduct occurs.

This Court held that 3 VAC 5-20-40(A) violates the First Amendment under *Central Hudson* primarily because the Defendants failed to explain how any part of the regulation directly advances the purported governmental aim of temperance. (Mem. Op. at 15.) In initial briefing, the Defendants argued primarily that this regulation was moot because of its upcoming repeal, and offered little to no defense of it at all. This Court declared the regulation unconstitutional in its entirety. *Id.*

The Defendants now contend that 3 VAC 5-20-40(A)'s prohibition of the term "speakeasy" may be applied constitutionally on a limited basis because the regulation remains constitutional as to advertising the unlawful sale of alcohol. (Defs.' Br. 5-6.) A "speakeasy," they say, is a restaurant that serves alcoholic beverages illegally. *Id.* Because such an operation is illegal, it does not pass Central Hudson's first prong requiring that the "commercial speech concern lawful activity and not be misleading." *Cent. Hudson*, 447 U.S. at 566. Therefore, advertising containing the term

"speakeasy" falls outside First Amendment protection.

This contention cannot stand. First, sweeping aside the issue of why any entity would seek to advertise unlawful activity, this Court cannot ignore the fact that the term "speakeasy" retains meaning only within the context of prohibition.[3] A place selling alcohol illegally would not be called a "speakeasy" in 2008 any more than an unconventional woman would be called a "flapper." Issuing a limited injunction retaining such antiquated language ignores the context in which the regulation currently exists, and defies common sense.

Second, even if the Court were inclined to so act, an injunction could not be fashioned. Defendants conceded at argument that, in order to effectuate this limitation, the Court would have to add the phrase "the unlawful sale of alcohol" to the regulation's prohibitions because the regulation does not say this on its face. Somehow the term "speakeasy" would have to remain while other phrases involving lawful conduct would have to be removed. This Court should not alter regulations to the degree required by Defendants' position: excising all but one of a regulation's prohibitions while adding phrases to it as well. No "clear line" can be drawn to retain the

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[3] The online version of the Compact Oxford English Dictionary defines "speakeasy" in this manner: "noun (pi. speakeasies) informal (in the US during Prohibition) an illicit liquor shop or drinking club." (emphasis in original).

constitutional aspects of the regulation's text even accepting Defendants' arguments. *PSINet*, 362 F.3d at 236. This Court cannot "rewrite a state law to conform it to constitutional requirements." *Am. Booksellers Ass'n, Inc.*, 484 U.S. at 397. Thus, any attempt to limit 3 VAC 5-20-40(A) cannot be effectuated by the Court without unduly encroaching on legislative authority, so the Court would have to order a permanent injunction, even utilizing the overbreadth analysis Defendants urge.

2. **3 VAC 5-20-40(B)(3)**

As to the second regulation, 3 VAC 5-20-40(B)(3), governing advertisements in college student publications and limiting ads to the use of certain terminology, the Defendants suggest that a limited constitutional application exists as well. Even assuming the Court should consider such an argument, it cannot agree with Defendants' contention on the merits.

First, this Court held that 3 VAC 5-20-40(B)(3) violates the First Amendment under *Central Hudson* because it did not directly and materially advance the stated governmental interest, and because it was not narrowly tailored to serve that interest. (Mem. Op. at 27, 31.) The Court found that any suggestion that the regulation materially advanced the governmental interest was speculative. (Mem. Op. 26,27.) No limited application or construction can rectify that inherent flaw. A limited application or construction of regulation that does not directly or

materially advance a governmental interest still would not directly advance the governmental interest.

Second, Defendants' proposed limitations fail for similar reasons to those discussed regarding 3 VAC 5-20-40(A). Any attempt to limit the regulation would involve intervention to a degree that would encroach on legislative authority. For example, restricting an injunction to college papers whose readership is "predominantly" underage provides no more clear a line of enforcement than the regulation already draws. This Court fails to see the clear line created by substituting the word "predominantly" for the word "primarily," which is how the regulation currently reads.[4] The proper balancing of a regulation's effect on "predominantly" underage readers versus the impact on adult readers steps beyond the confines of this Court's role as well. In the same fashion, confining an injunction to "similarly situated colleges and universities" proves too vague to offer genuine guidance about enforcement to the Alcohol and

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[4] Under the current regulation, a "'college student publication' is defined as any college or university publication that is prepared, edited or published primarily by students at such institution, is sanctioned as a curricular or extra-curricular activity by such institution and which is distributed or intended to be distributed primarily to persons under 21 years of age." 3 VAC 5-20-40(B)(3). (Emphasis supplied.)

Beverage Control Board, or to any student publication. Finally, for the same reasons stated above, the Court will not actively insert language preventing advertising for the "unlawful sale of alcohol."

In sum, the regulation simply is not subject to a limited, constitutional application. The Court cannot impose a limited injunction because the regulation is not 'readily susceptible' to a limited construction. Even if it were to adopt Defendants' proffered analytical framework, the Court would have to issue full injunctive relief.

C. **Equitable Balance of Hardships Test**

A permanent injunction is required under a traditional equitable balancing test applied by federal courts. *Amoco Prod. Co. v. Vill. ofGambell,* 480 U.S. 531, 542 (1987); *Blackwelder Furniture Co. v. SeiligMfg. Co., Inc.,* 550 F.2d 189,194 (4th Cir. 1977). Generally, injunctive relief requires consideration of (1) the likelihood of irreparable harm to the plaintiff without the injunction and whether the plaintiff has an adequate remedy at law; (2) the likelihood of harm to the defendant with the injunction; (3) the likelihood the plaintiff will succeed on the merits; and, (4) the public interest. *Amoco Prod. Co.,* 480 U.S. at 542; *Blackwelder,* 550 F.2d at 194. The Supreme Court has suggested satisfying the test is grounds for a permanent injunction provided the moving party has actually succeeded on the merits. *See eBay Inc.v. MercExchange,* 547 U.S. 388, 391 (2006); *Grupo Mexicano de Desarrollo v. Alliance Bond*

Fund, 527 U.S. 308, 314 (1999); *see also Shields v. Zuccarini*, 254 F.3d 476,482 (3rd Cir. 2001). In this case, Plaintiffs have succeeded on the merits; therefore, permanent injunctive relief is appropriate provided the remaining factors are satisfied.

As to the first factor generally considered, Plaintiffs will suffer irreparable harm in the absence of an injunction. The Supreme Court has noted that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002). In addition, Plaintiffs continue to lose revenue because of their inability to advertise alcoholic products. (Mem. Op. at 4, 6.) Moreover, monetary damages are generally inadequate for a First Amendment violation because quantification of injury can be difficult. *See Nat'l People's Action v. Vill. of Wilmette*, 914F.2d 1008,1013 (7th Cir. 1990). Regarding the second factor, issuing an injunction will not harm Defendants. Courts have recognized that enjoining enforcement of an unconstitutional law does no harm. *See Newsom v. Albemarle County Sch. Bd*, 354 F.3d 249, 261 (4th Cir. 2003). Finally, courts have recognized that "upholding constitutional rights serves the public interest." *Id.* In sum, under the equitable balance of hardships test, permanent injunctive relief should commence.

III. CONCLUSION

For the reasons stated above, this Court will issue a permanent injunction against the enforcement of the challenged regulations. An appropriate Order will follow.

/s/

United States Magistrate Judge

Richmond, Virginia

Date: June 19, 2008

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INCORPORATED; CAVALIER DAILY, INCORPORATED, The Cavalier Daily, Incorporated,

Plaintiffs-Appellees,

v.

SUSAN R. SWECKER, Commissioner, Virginia Alcoholic Beverage Control Commission; PAMELA O'BERRY EVANS, Commissioner, Virginia Alcoholic Beverage Control Commission; W. CURTIS COLEBURN, III, Chief Operating Officer Virginia Department of Alcoholic Beverage Control; FRANK MONAHAN, Director, Law Enforcement Bureau of the Virginia Department of Alcoholic Beverage Control; ESTHER H. VASSAR, Commissioner, Virginia Alcoholic Beverage Control Commission,

No. 08-1798

Defendants-Appellants.

THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; STUDENT PRESS LAW CENTER; COLLEGE NEWSPAPER BUSINESS AND

ADVERTISING MANAGERS,

Amici Supporting Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
M. Hannah Lauck, Magistrate Judge.
(3:06-cv-00396-MHL)

Argued: October 29, 2009

Decided: April 9, 2010

Before SHEDD, Circuit Judge,
HAMILTON, Senior Circuit Judge, and
Norman K. MOON, United States District Judge
for the Western District of Virginia, sitting by
designation.

Reversed and remanded by published opinion. Judge Shedd wrote the majority opinion, in which Senior Judge Hamilton joined. Judge Moon wrote a dissenting opinion.

COUNSEL

ARGUED: Catherine Crooks Hill, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellants. Rebecca Kim Glenberg, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA, Richmond, Virginia, for Appellees. **ON BRIEF:** William C. Mims, Attorney General, Stephen R. McCullough, Solicitor General of Virginia, Maureen Riley Matsen, Deputy Attorney General, OFFICE OF THE ATTORNEY

GENERAL OF VIRGINIA, Richmond, Virginia, for Appellants. Frank M. Feibelman, Cooperating Attorney, ACLU OF VIRGINIA, Richmond, Virginia, for Appellees. J. Joshua Wheeler, Robert M. O'Neil, THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, Charlottesville, Virginia, for the Thomas Jefferson Center for the Protection of Free Expression, Amicus Supporting Appellees. Katherine A. Fallow, Carrie F. Apfel, Garrett A. Levin, JENNER & BLOCK, LLP, Washington, D.C.; Frank D. LoMonte, Michael C. Hiestand, STUDENT PRESS LAW CENTER, Arlington, Virginia, for Student Press Law Center and College Newspaper Business and Advertising Managers, Amici Supporting Appellees.

OPINION

SHEDD, Circuit Judge:

The Commonwealth of Virginia, through its Alcoholic Beverage Control Board ("the Board"), regulates advertisements for alcohol. In this action, Educational Media Company at Virginia Tech (*The Collegiate Times*) and The Cavalier Daily, Inc. (*The Cavalier Daily*) (collectively, "the college newspapers") argue that two of the Board's regulations restricting alcohol advertisements (3 Va. Admin. Code §§ 5- 20-40(A) & (B)(3)) violate their First Amendment rights. The district court granted the college newspapers' motion for summary judgment, declared both provisions facially unconstitutional, and permanently enjoined their enforcement. On appeal, the Board challenges only

the court's invalidation of § 5-20-40(b)(3). For the reasons set forth below, we reverse and remand.

I.

We review the district court's order granting summary judgment *de novo*, viewing the evidence in the light most favorable to the Board. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 283 (4th Cir. 2004). The Board, a subsidiary of the Department of Virginia Alcoholic Beverage Control, is charged with regulating the importation and distribution of alcohol within the Commonwealth of Virginia. *See* Va. Code Ann. § 4.1-103. To carry out this duty, the Board has the authority to "promulgate reasonable regulations." Va. Code Ann. § 4.1-111(A).

The Board exercises its authority in various ways to fight illegal and abusive drinking on college campuses in the Commonwealth. For example, the Board prohibits various types of advertisements for alcohol in any "college student publication," which it defines as any college or university publication that is: (1) prepared, edited, or published primarily by its students; (2) sanctioned as a curricular or extracurricular activity; and (3) "distributed or intended to be distributed primarily to persons under 21 years of age." 3 Va. Admin. Code § 5-20- 40(B)(3). Qualifying publications may not print advertisements for beer, wine, or mixed beverages unless the ads are "in reference to a dining establishment." *Id.* These exempted alcohol advertisements may not refer to brand or price, but they may use five approved words and phrases, including "A.B.C. [alcohol beverage control] on-

premises," "beer," "wine," "mixed beverages," "cocktails," or "any combination of these words." *Id.*

In addition to this advertising ban, the Board publishes educational pamphlets on the dangers of underage and binge drinking on college campuses, targeted at both underage students and their parents. Further, the Board enforces its regulations by carefully allocating its limited number of officers to target "big events that are likely to gather college students," J.A. 257, and the Board gives grants to colleges and college communities to supplement these targeted efforts.

The Collegiate Times is a student-run newspaper at Virginia Polytechnic Institute and State University, and *The Cavalier Daily* is a student-run newspaper at the University of Virginia. The newspapers rely on advertisement revenue to operate, and because of the ban embodied in § 5-20-40(B)(3), each loses approximately $30,000 a year in advertising revenue.[1]

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[1] The district court determined that both college newspapers were "college student publications" as defined by § 5-20-40(B)(3). J.A. 73 & 75. However, the parties agree that a majority of the readership of the college newspapers is over the age of twenty-one. J.A. 85. Though this concession appears to preclude the college newspapers from qualifying as "college student publications," in a pre-enforcement challenge, the college newspapers need only demonstrate "'a credible threat of prosecution' under the statute or regulation." *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 386 (4th Cir. 2001) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Here, an Alcoholic Beverage Control Compliance Officer specifically advised *The Collegiate Times* that they *would* violate § 5-20-40(B)(3) if they published a specific alcohol advertisement, J.A. 73, and the Chief Operating Officer and Secretary to the Board of the Department of Alcoholic Beverage Control opined that both college newspapers would

The college newspapers filed a complaint, alleging that § 5- 20-40(B)(3) violates their First Amendment rights. The college newspapers mounted both facial and as-applied challenges to § 5-20-40(B)(3). For relief, the college newspapers sought a declaration that § 5-20-40(B)(3) is unconstitutional and an injunction prohibiting its enforcement. After both sides moved for summary judgment, the district court declared § 5- 20-40(B)(3) *facially* unconstitutional as an invalid ban on commercial speech.[2] Subsequently, the court permanently enjoined the enforcement of § 5-20-40(B)(3). The Board now appeals.

II.

The Board argues that the district court erred by determining that § 5-20-40(B)(3) facially violates the First Amendment.[3] Both parties agree that to

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qualify as college student publications. J.A. 523. Therefore, regardless of whether § 5-20-40(B)(3) applies to these college newspapers, they have a sufficient credible fear of prosecution under this regulation.

[2] The district court did not reach the college newspapers' alternative arguments that § 5-20-40(B)(3) violates the First Amendment because (1) as-applied, it unconstitutionally restricts commercial speech under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980), and (2) on its face and as-applied, it unconstitutionally discriminates against a particular segment of the media under *Pitt News v. Pappert*, 379 F.3d 96, 109 (3rd Cir. 2004). Though the college newspapers reiterate these alternative arguments on appeal, we decline to address them in the first instance.

[3] The Board also argues that the district court erred because it entertained a facial challenge to § 5-20-40(B)(3). Although there is judicial disfavor of facial challenges, there is no proscription on such challenges. *See Washington State Grange v.*

determine whether a regulatory burden on commercial speech violates the First Amendment, we apply the four-part test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980).

Under *Central Hudson*, we must first consider whether the commercial speech is protected by the First Amendment. If it is, the government must then assert a "substantial" interest to justify its regulation. We must then decide whether the regulation directly advances the government's interest and whether the regulation is not "more extensive than is necessary to serve that interest." *Id.* This test applies to both facial and as applied challenges. *See, e.g., Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 339-44 (1986) (facial challenge); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183-95 (1999) (as-applied challenge). However, the *type* of challenge to a provision — facial or as-applied — dictates the state's burden of proof.

"[A] facial challenge to an ordinance restricting commercial speech may be resolved as a question of law when the government meets the burden placed on it by *Central Hudson*." *Penn Advertising of Baltimore, Inc. v. Schmoke*, 63 F.3d 1318, 1322-23 (4th Cir. 1995), *vacated on other*

Washington State Republican Party, 552 U.S. 442, 449-51 (2008) (discussing the problems with facial challenges without banning their use); *West Virginia Ass'n of Club Owners and Fraternal Serv. Inc. v. Musgrave*, 553 F.3d 292, 300-02 (4th Cir. 2009) (same).

grounds, *Penn Advertising of Baltimore, Inc. v. Schmoke*, 518 U.S. 1030 (1996). The government may meet this burden by reference to the challenged regulation and its legislative history. *Id.* at 1325. Therefore, a court considers the facial constitutionality of a regulation without regard to its impact on the plaintiff asserting the facial challenge. *Id.*

A.

We first consider whether the First Amendment protects the commercial speech in this case. To qualify for First Amendment protection, commercial speech must (1) concern lawful activity and (2) not be misleading. *Central Hudson*, 447 U.S. at 566-68. The Board argues that § 5-20-40(B)(3) only regulates commercial speech concerning unlawful activity because it only applies to student newspapers which are "distributed or intended to be distributed primarily to persons under 21 years of age," § 5-20-40(B)(3), and in Virginia, it is illegal to sell alcohol to anyone under twenty-one. Va. Code Ann. § 4.1-302.

We have recognized that advertisements for age-restricted — but otherwise lawful — products concern lawful activity where the audience comprises both underage and of-age members. *See, e.g.*, *West Virginia Ass'n of Club Owners and Fraternal Serv. Inc. v. Musgrave*, 553 F.3d 292, 302 (4th Cir. 2009) (video lottery ads in retail stores); *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1313 (4th Cir. 1995) (*Anheuser- Busch I*) (alcohol advertisements in public), *vacated on other grounds*, *Anheuser-Busch,*

Inc. v. Schmoke, 517 U.S. 1206 (1996). On its face, § 5-20-40(B)(3) does not restrict commercial speech *solely* distributed to underage students; rather, it applies to commercial speech that, though *primarily* intended for underage students, also reaches of-age readers. Therefore, the commercial speech regulated by § 5-20-40(B)(3) concerns lawful activity.

Further, because this is a facial, pre-enforcement challenge, "[w]e assume that the speech is not misleading because . . . [the Board] has not provided evidence that the speech is actually misleading, and there is no evidence that the advertising restrictions were enacted to prevent the dissemination of misleading information." *Musgrave*, 553 F.3d at 302. The district court, therefore, properly found that § 5-20-40(B)(3) restricts commercial speech protected by the First Amendment.

B.

"Next, we ask whether the asserted governmental interest is substantial." *Central Hudson*, 447 U.S. at 566. The Board contends that it has a substantial interest in combating the serious problem of underage drinking and abusive drinking by college students. The college newspapers do not dispute that this interest is substantial. *See* Appellee's Br. 14. Therefore, like the district court, we find the Board's interest to be substantial.

C.

We next consider whether the advertising ban "directly and materially" advances the government's

substantial interest. *Musgrave*, 553 F.3d at 303 (internal citation and quotation omitted). To determine whether this prong is satisfied "we focus on the relationship between the State's interests and the advertising ban." *Central Hudson*, 447 U.S. at 569. This relationship, or link, need not be proven by empirical evidence; rather, it may be supported by "history, consensus, and simple common sense." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)). However, the link is insufficient if it is irrational, contrary to specific data, or rooted in speculation or conjecture. *Musgrave*, 553 F.3d at 304.

The Board asserts that history, consensus, and common sense support the link between advertising bans in college newspapers and a decrease in demand for alcohol among college students. The Board cites judicial decisions recognizing this general link and argues that, here, this link is extraordinarily strong because college newspapers, a targeted form of media bearing the name of the college, attract more attention among college students than other forms of mass media. The Board also notes that, given the amount of money alcohol vendors spend on advertisement, it is illogical to think that alcohol ads do not increase demand. The college newspapers counter by arguing that: (1) there is no evidence that alcohol advertising bans in college publications decrease demand among college students and (2) a ban on alcohol advertising in college publications is ineffective because college students see ads for alcohol in various other forms of

media.[4] The district court agreed with the college newspapers.

We, however, find the link between § 5-20-40(B)(3) and decreasing demand for alcohol by college students to be amply supported by the record, and the district court erred by finding otherwise. Though the correlation between advertising and demand alone is insufficient to justify advertising bans in every situation, *Musgrave*, 553 F.3d at 304, here it is strengthened because "college student publications" primarily target college students and play an inimitable role on campus. *See* J.A. 259 ("The college publication is where [college students are] looking to find out what's going on in their college community, what's happening."). This link is also supported by the fact that alcohol vendors *want* to advertise in college student publications. It is counterintuitive for alcohol vendors to spend their money on advertisements in newspapers with relatively limited circulation, directed primarily at college students, if they believed that these ads would not increase demand by college students. The college newspapers fail to provide evidence to *specifically* contradict this link or to recognize the

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[4] The college newspapers also argue that, even if there is a link between advertising bans and demand, § 5-20-40(B)(3)'s exemptions undermine its effectiveness. This argument fails to take into account the actual scope of § 5-20-40(B)(3). Even with its exemptions, it proscribes without exception all alcohol ads for non-restaurants. Therefore, in light of the full scope of § 5-20-40(B)(3), its limited exception for restaurants does not render it futile.

distinction between ads in mass media and those in targeted local media.

The district court, therefore, erred by finding that this link did not satisfy *Central Hudson's* third prong. Even though this link is established, we must still decide whether § 5-20- 40(B)(3) satisfies *Central Hudson's* fourth prong.

D.

Under *Central Hudson's* fourth prong, commercial speech restrictions must be "narrowly drawn." *Central Hudson*, 447 U.S. at 565. The restrictions do not need to be the least restrictive means possible, but they do need to have a "reasonable fit with the government's interest — a fit 'that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.'" *Musgrave*, 553 F.3d at 305 (*quoting Greater New Orleans Broad.*, 527 U.S. at 188). Further, the state "must consider alternatives to regulating speech to achieve its ends." *Musgrave*, 553 F.3d at 305. Where a state has a comprehensive scheme to serve its interest, limitations on commercial speech should "complement non-speech alternatives," not serve as substitutes for them. *See id.* at 306.

Here, § 5-20-40(B)(3) is narrowly tailored to serve the Board's interest of establishing a comprehensive scheme attacking the problem of underage and dangerous drinking by college students. Section 5-20-40(B)(3) is not a complete ban on alcohol advertising in college newspapers. First, it only prohibits certain types of alcohol

advertisements. In fact, it allows restaurants to inform readers about the presence and type of alcohol they serve. Second, the restriction only applies to "college student publications" — campus publications targeted at students under twenty-one. It does not, on its face, affect all possible student publications on campus. Therefore, § 5-20-40(B)(3) is sufficiently narrow.

Further, the Board not only considered non-speech related mechanisms to serve its interest, it actually implemented them through education and enforcement programs. Section 5-20- 40(B)(3) complements these non-speech alternatives. Within the Board's multi-pronged attack on underage and abusive drinking, § 5-20-40(B)(3) constitutes an additional prevention mechanism. Without it, either education or enforcement efforts would have to be increased, and given the Board's limited resources, § 5-20-40(B)(3) is a cost-effective prevention method that properly complements their non-speech related efforts.

The college newspapers argue that § 5-20-40(B)(3) is not the least restrictive means to serve the Board's interest because there are other, more effective ways to fight underage and abusive drinking without restricting speech. However, § 5-20-40(B)(3) does "not necessarily [need to be] the single best disposition[,] but one whose scope is in proportion to the interest served." *Musgrave*, 553 F.3d at 305 (*quoting Greater New Orleans Broad.*, 527 U.S. at 188). The Board has shown that § 5-20-40(B)(3) is an integral, reasonable fit to serve its interests. The possible existence of more effective

methods does not undermine § 5-20-40(B)(3), especially in light of its role in a comprehensive scheme to fight underage and abusive drinking. The district court, therefore, erred by finding § 5-20-40(B)(3) to be overly broad.

E.

On its face, the Board's ban on alcoholic advertisements in college student publications passes muster under *Central Hudson*. The district court, therefore, erred in finding otherwise.

III.

For the foregoing reasons, we reverse the district court's order granting summary judgment, vacate its permanent injunction, and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED

MOON, District Judge, dissenting:

I respectfully dissent.

Preliminarily, I observe that the regulation, properly construed, does not apply to these newspapers. "[T]he parties agree that a majority of the readership of the college newspapers is over the age of twenty-one," *ante* at n. 1, and the undisputed statistical evidence in the record supports that agreement. More than half of the students at these universities are over the age of twenty-one, as of course are most faculty and staff. J.A. 464, 470-71, 477, 480. Given that a majority of the readership is over the age of twenty-one, these college newspapers

are not "distributed or intended to be distributed primarily to persons under 21 years of age," as required to be subject to the strictures of 3 Va. Admin. Code § 5-20-40(B)(3). This case could be resolved on that ground without reaching the broader constitutional question. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); *see also Thompson v. Greene*, 427 F.3d 263, 267 (4th Cir. 2005) (quoting *Ashwander*). However, both the district court and the majority reach and address the constitutional question, and so I do as well.[1]

---

[1] The Board argued before the district court that "the regulation 'is no longer at issue'" because "the ABC Department has not enforced [the regulation] since the filing of the instant suit" and "the ABC Department intends to implement a committee to examine the advertising regulations." J.A. 82. The district court observed that "[t]he regulation . . . remains promulgated in the Virginia Administrative Code," and determined that "voluntary cessation of enforcement, even with the intent to reconsider the merits of the regulation," did not render the regulation moot, given that the Board "could elect to enforce [the regulation] at any time" and "any intention to repeal the regulation is, at best, speculative." *Id.* As the majority notes, "regardless of whether § 5-20-40-(B)(3) applies to these college newspapers, they have a sufficient credible fear of prosecution under this regulation." *Ante* at n. 1. Nonetheless, it is my opinion that the better approach would be to avoid the constitutional question, providing relief "'no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Were we to hold that the regulation does not apply to these

On the merits of the constitutional issue, I think we should affirm. To satisfy the requirement that the regulation "directly advances the governmental interest asserted," *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980), the government must demonstrate that the challenged law "alleviate[s]" the cited harms "to a material degree," *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995) (citation omitted); *see also Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999); *Pitt News v. Pappert*, 379 F.3d 96, 107 (3rd Cir. 2004). "This burden is not satisfied by mere speculation or conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001); *Pitt News*, 379 F.3d at 107. It is likewise not enough if a law "provides only ineffective or remote support for the government's purposes," *Edenfield*, 507 U.S. at 770 (quoting *Central Hudson*, 447 U.S. at 564), or if there is "little chance" that the law will advance the state's goal, *Lorillard*, 533 U.S. at 566. *See also Pitt News*, 379 F.3d at 107. Meeting this burden "is critical; otherwise, 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a

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newspapers, the state would be barred from further attempts to enforce the regulation against them. *See, e.g., State Water Control Bd. v. Smithfield Foods, Inc.*, 261 Va. 209, 214-15 (2001) (final judgment on the merits of a claim in federal court precludes the parties from further litigation on that claim in state court).

burden on commercial expression.'" *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995)(quoting *Edenfield*, 507 U.S. at 771); *see also Pitt News*, 379 F.3d at 107. In sum, the burden is on the government, and the record here supports the district court's finding that the government failed to carry its burden.[2]

I am persuaded by an opinion from the Third Circuit dealing with similar facts. *Pitt News v. Pappert* (written by then- Judge Alito) invalidated a Pennsylvania statute that banned "advertisers from paying for the dissemination of 'alcoholic beverage advertising' by communications media affiliated with a university, college, or other 'educational institution.'"[3] 379 F.3d at 101. *Pitt News* ruled that the Pennsylvania statute "founder[ed] on the third and fourth prongs of the *Central Hudson* test."[4] *Id.* at

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[2] The district court found the government's evidence speculative. J.A. 92-96. For example, the district court observed that the Board's expert "offers no rationale or evidence, beyond conjecture, to support his claim as to the singularity of a college publication. . . . [H]is insight ignores the common sense reality that college students now live in a multimedia environment . . ., all of which display uncensored alcoholic advertisements." J.A. 95-96.

[3] To be sure, the statute at issue in *Pitt News* did not contain the exemptions allowed by § 5-20-40(B)(3); however, as I explain *infra*, those exemptions constitute inconsistencies that, under a *Central Hudson* analysis, further undermine the legitimacy of § 5-20-40(B)(3).

[4] *Pitt News* also found the Pennsylvania statute "presumptively unconstitutional because it targets a narrow segment of the media. . . ." 379 F.3d at 105. Having broached the constitutional issue, I would embrace also the alternative argument that the regulation unjustifiably targets a specific segment of the media.

107. Finding that the third prong of the *Central Hudson* test had not been met, the Third Circuit observed that the Commonwealth of Pennsylvania had not carried its burden of showing that the statute "had the effect of greatly reducing the quantity of alcoholic beverage ads viewed by underage and abusive drinkers on the Pitt campus. . . ." *Id.* The court found that the Pennsylvania statute applied

> only to advertising in a very narrow sector of the media (i.e., media associated with educational institutions), and the Commonwealth has not pointed to any evidence that eliminating ads in this narrow sector will do any good. Even if Pitt students do not see alcoholic beverage ads in *The Pitt News*, they will still be exposed to a torrent of beer ads on television and the radio, and they will still see alcoholic beverage ads in other publications, including the other free weekly Pittsburgh papers that are displayed on campus together with *The Pitt News*. The suggestion that the elimination of alcoholic beverage ads from *The Pitt News* and other publications connected with the University will slacken the demand for alcohol by Pitt students is counterintuitive and unsupported by any evidence that the Commonwealth has called to our attention.

Id.

Here, as in *Pitt News*, "the Commonwealth relies on nothing more than 'speculation' and

'conjecture.'" *Id.* at 107-08. Under the third prong of a *Central Hudson* analysis, I disagree with the finding that "the link between § 5-20-40(B)(3) and decreasing demand for alcohol by college students [is] amply supported by the record." *Ante* at 9. The evidence in the record indicates such a link is speculative, at best.[5] Nor am I persuaded by "the fact

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[5] The newspapers' expert concluded that "no evidence exists to support a substantial or material effect of a ban of alcohol advertising in college newspapers. . . . Brand advertising only affects brand sales (or vice versa), and market-wide demand for alcohol is not stimulated by advertising." J.A. 486. And, although the Board's expert reached the opposite conclusion, an examination of his published articles and his deposition testimony reveals that there is no evidence that the regulation directly and materially advances the goal of diminishing underage or abusive drinking by college students. Indeed, the Board's expert has published the statement that "[t]here is . . . very little empirical evidence that alcohol advertising has any effect on actual alcohol consumption." J.A. 310-11, 326. The Board's expert has also acknowledged that a ban on advertising in one medium generally results in greater advertising saturation in other media or forms of marketing. J.A. 343, 350.

Moreover, as the district court recognized, the regulation has been on the books, altered over time to reflect changes in the legal drinking age, since the repeal of Prohibition. J.A. 84, 93. Yet, as the Commonwealth implicitly concedes, underage and abusive drinking by college students has not diminished since the enactment of this regulation; rather, the evidence demonstrates that the problem has grown and exacerbated over time, despite the decades-old restriction. J.A. 93. This suggests to me that the regulation does not materially advance the Commonwealth's purported interest in curbing underage or excessive drinking. J.A. 93-94.

that alcohol vendors *want* to advertise in college student publications" and that alcohol vendors would not "spend their money on advertisements in" college student publications "if they believed that these ads would not increase demand by college students." *Ante* at 9. The Board's justification for the regulation is not to reduce general "demand by college students," a significant number of whom are of legal age to imbibe, but to reduce "*underage* and *abusive* drinking among college students." Appellants' Br. At 2 (emphasis added). The regulation not only impermissibly infringes upon the constitutional rights of adults (with the result of limiting the adult readership to receiving only speech that the Commonwealth deems appropriate for persons under the age of twenty-one), it also infringes upon the rights of those readers who are not yet twenty-one, who nonetheless have a protected interest in receiving truthful, non-misleading information about a lawful product that they will soon have the legal right to consume. And of course the advertisers have the right to communicate such information.

As for the fourth prong under *Central Hudson*, I acknowledge that § 5-20-40(B)(3) contains exemptions that permit restaurants to advertise "the presence and type of alcohol they serve." *Ante* at 10. Indeed, the poor "fit" between the regulation and the Commonwealth's asserted goal is belied by what § 5-20-40(B)(3) permits. *Lorillard*, 533 U.S. at 555; *Greater New Orleans*, 527 U.S. at 188; *West Virginia Ass'n of Club*

Owners and Fraternal Serv. Inc. v. Musgrave, 553 F.3d 292, 305 (4th Cir. 2009); *Pitt News*, 379 F.3d at 108. Although the regulation prohibits advertising of prices, brands of alcohol, and names of specialty drinks, it allows promotions of "beer," "wine," and "mixed beverages" to appear in the very same newspapers that are allegedly "targeted at students under twenty-one." *Ante* at 10. It is inconsistent to maintain that a regulation that permits advertisements for "beer night" or "mixed drink night" "in reference to a dining establishment" forms a reasonable fit with the goal of curbing underage or excessive drinking merely because it forbids advertisements for keg delivery, "mojito night," or the "Blacksburg Wine Festival."[6] J.A. 73, 74. Indeed, the Supreme Court has pointed to this sort of internal inconsistency in striking down advertising

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[6] Nor does the regulation form a reasonable fit to its goal insofar as it prohibits advertisements for national brands, considering the heavy promotion of these products in other media, including print media, available to college students regardless of whether they are of legal age to drink. According to the Board, however, "the alcohol industry" restricts "advertisement of alcoholic beverages to media where at least 70% of the audience is reasonably expected to be over the age of 21." Appellants' Reply Br. at 10; J.A. 359. The Board thus contends that its regulation "is not about brand advertising," but "is about bars and grocery stores, *drink specials* and discounts, intended to attract purchasers - not to a particular brand, but to a *particular outlet or venue*, or even just off campus – to locations where alcohol will be sold." *Id.* (emphasis added). Yet the exemptions in the regulation permit a "dining establishment," *i.e.*, a "particular outlet or venue," to promote "beer night" or "mixed drink night."

regulations under the third prong of a *Central Hudson* analysis. *See Greater New Orleans*, 527 U.S. at 190 (observing that a ban on broadcasting lottery information was "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."); *Coors Brewing*, 514 U.S. at 490 (the government's "anecdotal evidence and educated guesses" do not "overcome the irrationality of the regulatory scheme," which prohibited alcohol content information in labeling but not in advertising). An attempt to rationalize these inconsistencies, defending them on the ground that the regulation "is not a *complete* ban on alcohol advertising in college newspapers," *ante* at 10 (emphasis added), may state an accurate observation; however, the statement is wholly unresponsive to the requirements of *Central Hudson*. It fails to disguise the fact that there is no empirical support for banning one type of advertisement but not the other.

I disagree with the finding that § 5-20-40(B)(3) is "sufficiently narrow" because it applies to "campus publications targeted at students under twenty-one" and "does not, on its face, affect all possible student publications on campus." *Ante* at 10. While the latter observation may be true, the former is not. There is no evidence that these newspapers are "targeted at students under twenty-one."[7] The record reveals that

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[7] As I have already observed, the parties agree that a majority of the readership of the college newspapers is over the age of twenty-one, and the undisputed statistical evidence in the record supports that agreement. J.A. 464, 470-71, 477, 480. A majority of the students at these universities are over the age of twenty-one, as of course are most faculty and staff. *Id.*

the majority of the readership of these newspapers is of legal age to drink. Accordingly, under the fourth step of the *Central Hudson* test, the regulation here, like the Pennsylvania statute in *Pitt News*, is not "a means narrowly tailored to achieve the desired objective," *Lorillard*, 533 U.S. at 555 (quotations omitted), given that it "is both severely over- and underinclusive," *Pitt News*, 379 F.3d at 108 (observing that "more than 67% of Pitt students and more than 75% of the total University population is over the legal drinking age").

True, the regulation need not be "the single best disposition," but only "one whose scope is in

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Appellants argue that "[t]he intended audiences of the UVA and Va. Tech student newspapers include a relatively large population of graduate and professional students," but that, "[w]here the student population of an institution is comprised only of undergraduates, it is likely that its student newspaper's intended audience is comprised primarily of undergraduate students" who are under age twenty-one. Appellants' Br. at 23. Although in most circumstances a facial challenge to the constitutionality of a law can succeed only by establishing that there is no set of circumstances under which the law would be valid, *i.e.*, that the law is unconstitutional in all of its applications, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-51 (2008), facial changes "in the First Amendment context" may succeed when a "substantial number" of the law's applications are unconstitutional, *id.* at 450, n. 6 (citations omitted). Additionally, "[i]n determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* at 449-50 (citation omitted).

proportion to the interest served." *Musgrave*, 553 F.3d at 305. However, a commercial speech restriction must be "'a *necessary* as opposed to merely convenient means of achieving'" the Commonwealth's interests, and "the costs and benefits associated with" the restriction must be "'carefully calculated.'" *Musgrave*, 553 F.3d at 305 (citations omitted; emphasis added). Here, the scope of § 5-20-40(B)(3), and its impact on protected commercial speech, are far out of proportion to the interest served, and the record indicates that "the Commonwealth can seek to combat underage and abusive drinking by other means that are far more direct and that do not affect the First Amendment."[8] *Pitt News*, 379 F.3d at 108.

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[8] For example, the Board's own expert has acknowledged the following more direct means: increased taxation on alcohol, which has been empirically verified and quantified as a means to combat underage and binge drinking ("[i]ncreased taxation is more effective than advertising bans") (J.A. 21, 319); and counter-advertising to correct students' perceptions about their peers' drinking habits and provide facts as to the dangers of underage and excessive drinking ("increased counteradvertising, rather than new advertising bans, appears to be the better choice for public policy") (J.A. 351). *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion of Stevens, J., joined by Kennedy, Souter, and Ginsburg) ("As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation."); *id.* at 530 (O'Connor, J., concurring, joined by Chief Justice Rehnquist and Justices Breyer and Souter) ("Rhode Island's own expert conceded that the objective of lowering consumption of alcohol by banning price advertising could be accomplished by establishing minimum prices and/or by increasing

sales taxes on alcoholic beverages.") (internal quotation marks and citation omitted). Indeed, the Board uses the following

In short, the advertising ban here offers "only ineffective or remote support," not a direct means, to combat underage and abusive drinking. *Central Hudson*, 447 U.S. at 564; *Edenfield*, 507 U.S. at 770; *Pitt News*, 379 F.3d at 107.

In my view, the regulation cannot withstand constitutional scrutiny under *Central Hudson*. It is objectionable that the Commonwealth's rationale for the regulation applies only to underage and abusive drinking, while the regulation itself applies much more broadly. In free speech cases, it is dangerous and unwise to sustain broad regulations for narrow reasons. *Central Hudson* confirms this reasoning, recognizing that a regulation restricting commercial speech must be "'narrowly drawn.'" 447 U.S. at 565 (citation omitted). Section 5-20-40(B)(3) fails to "directly advance[ ] the governmental interest asserted" and is "more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. I would therefore affirm the judgment below.

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direct means: publishing "educational pamphlets on the dangers of underage and binge drinking on college campuses, targeted at both underage students and their parents"; enforcing "its regulations by carefully allocating its limited number of officers to target 'big events that are likely to gather college students'"; and giving "grants to colleges and college communities to supplement these targeted efforts." *Ante* at 4.

FILED: May 28, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1798

(3:06-cv-00396-MHL)

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INCORPORATED; CAVALIER DAILY, INCORPORATED, The Cavalier Daily, Incorporated

Plaintiffs – Appellees

v.

SUSAN R. SWECKER, Commissioner, Virginia Alcoholic Beverage Control Commission; PAMELA O'BERRY EVANS, Commissioner Virginia Alcohol Beverage Control Commission; W. CURTIS COLEBURN, III, Chief Operating Officer Virginia Department of Alcoholic Beverage Control; FRANK MONAHAN, Director, Law Enforcement Bureau of the Virginia Department of Alcoholic Beverage Control; ESTHER H. VASSAR

Defendents – Appellants

THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION;

STUDENT PRESS LAW CENTER; COLLEGE NEWSPAPER BUSINESS AND ADVERTISING MANAGERS

Amici Supporting Appellee

ORDER

The Court denies the petition for rehearing or rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Shedd, Senior Judge Hamilton and District Judge Moon.

For the Court

__/s/_____

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No. 10-278

In The Supreme Court of the United States

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INCORPORATED; CAVALIER DAILY, INCORPORATED,

Petitioners,

v.

SUSAN R. SWECKER, COMMISSIONER, VIRGINIA ALCOHOLIC BEVERAGE CONTROL COMMISSION; PAMELA O'BERRY EVANS, COMMISSIONER, VIRGINIA ALCOHOLIC BEVERAGE CONTROL COMMISSION; W. CURTIS COLEBURN, III, CHIEF OPERATING OFFICER, VIRGINIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; FRANK MONAHAN, DIRECTOR, LAW ENFORCEMENT BUREAU OF THE VIRGINIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; ESTHER H. VASSAR, COMMISSIONER, VIRGINIA ALCOHOLIC BEVERAGE CONTROL COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Circuit erred in applying the framework under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), for evaluating a regulation restricting commercial speech dealing with advertisements of alcohol in college newspapers.

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Virginia Attorney General Kenneth T. Cuccinelli, II, on behalf of the state defendants, submits this Brief in Opposition to the Petition for Certiorari.

STATEMENT OF THE CASE

Educational Media is a private non-profit corporation that publishes *Collegiate Times*, a student-run newspaper at Virginia Polytechnic Institute and State University ("Virginia Tech"). (Pet. App. 5a). Copies of the newspaper are distributed on campus, throughout Blacksburg and in neighboring Christiansburg. Approximately 41% of the student readership of the *Collegiate Times* is below the age of 21. (Pet. App. 6a).

The Cavalier Daily is a student-run newspaper at the University of Virginia ("UVa."). (Pet. App. 9a). Copies of the newspaper are distributed on its campus, or "grounds," and in five locations off grounds. (Pet. App. 9a). Approximately 49% of "on-grounds" students are under the age of 21. (Pet. App. 10a). Between 36 to 42% of all UVa. students are under the age of 21. (Pet. App. 10a).

The Cavalier Daily and *Collegiate Times* filed suit challenging a pair of state regulations as invalid under the First Amendment of the United States Constitution. (Pet. App. 1a). Only one of these

regulations remains at issue. The regulation provides that:

> Advertisements of beer, wine and mixed beverages are not allowed in college student publications unless in reference to a dining establishment, except as provided below. A "College student publication" is defined as any college or university publication that is prepared, edited or published primarily by students at such institution, is sanctioned as a curricular or extra-curricular activity by such institution and which is distributed or intended to be distributed primarily to persons under 21 years of age.
>
> Advertising of beer, wine and mixed beverages by a dining establishment in college student publications shall not contain any reference to particular brands or prices and shall be limited only to the use of the following words: "A.B.C. on premises," "beer," "wine," "mixed beverages," "cocktails," or any combination of these words.

3 Va. Admin. Code § 5-20-40(B)(3). These newspapers wish to run alcohol-related advertisements. (Pet. App. 6a-8a, 10a-11a). The lawsuit named members of the Alcohol Beverage Control Board ("ABC Board") and other persons charged with enforcing the regulations.

The United States District Court for the Eastern District of Virginia reviewed the regulation under the four-part intermediate scrutiny test articulated in *Central Hudson Gas & Electric v. Public Service Comm'n*, 447 U.S. 557, 561-62, 564, 566 (1980). The

four requirements to be satisfied are (1) to receive any First Amendment protection, commercial speech "must concern lawful activity and not be misleading"; (2) the government must assert a "substantial" government interest to justify its regulation; (3) the regulation must "directly advance[ ] the governmental interest asserted"; and (4) the regulation must not be "more extensive than is necessary to serve that interest." *Id.* at 566.

The district court concluded that the sale of alcohol is lawful and not misleading. (Pet. App. 29a). The court further concluded that reducing underage and abusive consumption of alcohol represented a substantial governmental interest. (Pet. App. 29a-30a). Turning to the third component of the test, the court held that the regulation was deficient. The court found significant the absence of specific studies showing that underage or abusive drinking would be worse on campus without this regulation. (Pet. App. 39a). The court found unpersuasive the testimony of the ABC Board's expert economist, Dr. Henry Saffer, that college newspapers constitute a unique medium for which there is no substitute. (*Id.*) In the district court's view, "common sense suggests" that other media "might act as a substitute source of far more information to college students than does any newspaper." (Pet. App. 40a). Finally, the district court concluded that the fourth component, the required "narrow tailoring," was not present here. (Pet. App. 44a-45a). The court invalidated the

regulation as facially unconstitutional under *Central Hudson*. (Pet. App. 48a, 57a, 62a-64a).

The district court declined to reach the plaintiffs' alternative argument, namely, that 3 Va. Admin. Code § 5-20-40(B)(3) is unconstitutional because it singles out a "specific segment of the media." (Pet. App. 45a-47a).[1]

The Board appealed to the Fourth Circuit. A divided panel of that court reversed. The Fourth Circuit agreed with the district court concerning the first two parts of the *Central Hudson* test, that the speech at issue was protected by the First Amendment and that the governmental interest in combating abusive and underage drinking was substantial. (Pet. App. 74a-75a).

Turning to the third part of the test, the Fourth Circuit found that "the link between § 5-20-40(B)(3) and decreasing demand for alcohol by college students to be amply supported by the record." (Pet. App. 77a). The court observed that the link between advertising and demand would not justify advertising bans in every situation, but that the link here is strengthened because "'college student

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[1] In *The Pitt News v. Pappert,* 379 F.3d 96 (3rd Cir. 2004) (Alito, J.), a panel of the Third Circuit after finding an advertising bar unconstitutional under *Central Hudson* also concluded that a regulation banning all alcohol advertisements in the newspapers of educational institutions violated the First Amendment because it "unjustifiably imposes a financial burden on a particular segment of the media." *Id.* at 109.

publications' primarily target college students." (*Id.*) The court further noted that it was "counterintuitive for alcohol vendors to spend their money on advertisements in newspapers with relatively limited circulation, directed primarily at college students, if they believed that these ads would not increase demand by college students." (*Id.*) Lastly, the court held that the plaintiffs had not provided any evidence that contradicted this link. (*Id.*)

Finally, the court found that the regulation was narrowly drawn. (Pet. App. 78a). The court reasoned that the regulation was not a complete ban but rather that it only prohibited certain types of advertisements. (Pet. App. 78a-79a). Moreover, the regulation did not ban all publications from advertising, instead it regulates those publications "targeted at students under twenty-one." (Pet. App. 79a). The court upheld the regulation as facially valid and remanded the case for further proceedings. (Pet. App. 80a).

The court expressly declined to address two questions: (1) whether the regulation was unconstitutionally applied to the two plaintiffs in violation of their constitutional rights to engage in commercial speech; and (2) whether the regulation unconstitutionally discriminates against a particular segment of the media. (Pet. App. 72a n.2). Those questions will be addressed on remand. (Pet. App. 72a, 80a).

Judge Moon, sitting by designation, dissented. First, Judge Moon concluded that the regulation did not apply at all to the two plaintiffs. He noted that the parties agree that "a majority of the readership of the [plaintiffs'] newspapers is over the age of twenty-one," and, therefore, the regulation does not apply to them because it is limited to newspapers "'distributed or intended to be distributed to persons under 21 years of age.'" (Pet. App. 80a-81a). Second, Judge Moon disagreed that the regulation satisfied the third and fourth parts of the *Central Hudson* test. In his view, the evidence presented by the Board is "speculative" concerning a reduction in demand by underage persons. (Pet. App. 83a-86a). Furthermore, on the fourth part of the test, he concluded that the regulation was a poor fit between the public policy goals and the restrictions imposed. (Pet. App. 86a-91a).

REASONS FOR DENYING THE PETITION

This case involves only the application of settled law to case-specific facts such that there is no actual circuit split; the case is susceptible to being decided on an independent state ground which has not been definitively decided in the courts of Virginia; the case has been remanded and other alternative federal grounds are unresolved; and even if a circuit split were found to exist it is shallow and not well developed.

I. THERE IS NO SPLIT IN THE CIRCUITS REGARDING THE APPLICATION OF THE *CENTRAL HUDSON* FRAMEWORK.

The plaintiffs argue that certiorari should be granted to resolve a split between *The Pitt News* and the present case. In fact, these two cases constitute fact-specific applications of legal principles to different regulations based on differing evidentiary records. This Court expressly has approved the use of "common sense" in assessing whether a government regulation of commercial speech advances a governmental interest. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (courts may turn to "history, consensus, and 'simple common sense.'") (citation omitted). Precisely when courts should turn to common sense and when empirical or historical evidence is necessary will depend on case specific considerations. That is what occurred here.

First, the regulation at issue here differs both factually and legally from the regulation at issue in *The Pitt News*. As a factual matter, the Third Circuit found "unsupported by any evidence" the conclusion that "elimination of alcoholic beverage ads from *The Pitt News* and other publications connected with the University will slacken the demand for alcohol by Pitt students." *Id.* at 107. The Court held that Pennsylvania had relied on "nothing more than 'speculation' and 'conjecture'" in its defense of the statute. *Id.* at 107-08. In contrast, in the case at bar, the ABC Board presented evidence from an expert, Dr. Henry Saffer, a professor of economics at Kean

University. (Pet. App. 12a-13a). He concluded that an increase in advertising increases alcohol consumption and, conversely, a decrease in advertising would reduce binge drinking. (Pet. App. 13a). The ABC Board also presented statements from university officials, including the Dean of Students at UVa. and the Director of Judicial Affairs at Virginia Tech, who drew from their experience to conclude that 3 Va. Admin. Code § 5-20-40(B) would assist the universities' overall efforts to combat underage drinking. (Pet. App. 14a-15a). Likewise, the Director of the Center for Alcohol and Substance Abuse Education at UVa. concluded, based on her knowledge and experience, that the regulation will assist the university's efforts to prevent the consumption of alcoholic beverages by students under the age of 21. Unlike the Third Circuit in *The Pitt News*, the Fourth Circuit did not have to engage in "speculation" and "conjecture." Instead, it could find "the link between § 5-20-40(B)(3) and decreasing demand for alcohol by college students to be amply supported by the record." (Pet. App. 77a). The case at bar stands on a different evidentiary footing than the case before the court in *The Pitt News*.

The plaintiffs and their amici depict the Fourth Circuit's decision as ignoring the evidence and resting its decision instead entirely on "common sense." (Pet. 10-13). That is simply not the case. The panel found the link between the regulation and decreasing demand for alcohol by college students to be "amply supported by the record." (Pet. App. 77a). The panel

majority did not purport to rest its conclusions exclusively on "common sense."

Moreover, the regulation at issue in *The Pitt News* was severely overinclusive because it banned all advertising in university publications, even though "more than 75% of the total University population is over the legal drinking age." 379 F.3d at 108. A publication devoted exclusively to graduate students, or even one having faculty members as a target audience, was swept into this broad ban. Here, the regulation is expressly designed to target publications that are "distributed or intended to be distributed primarily to persons under 21 years of age." 3 Va. Admin. Code § 5-20-40(B)(3). Given this difference, the Fourth Circuit did not err in concluding that the regulation was not overbroad "on its face." (Pet. App. 80a). The court expressly did not reach the question of whether the regulation might be unconstitutional as applied to these newspapers. (Pet. App. 72a n.2). In sum, there is no split for this Court to resolve.

II. THIS CASE CONSTITUTES A POOR VEHICLE FOR ADDRESSING THE SCOPE OF THE *CENTRAL HUDSON* TEST BECAUSE A STATE COURT HAS NEVER CONSTRUED THE REGULATION AT ISSUE AND A CONSTRUCTION FAVORABLE TO THE PLAINTIFFS IS POSSIBLE.

"[N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them." *Harrison v. NAACP*, 360 U.S. 167, 176 (1959). No state court has had the opportunity to construe the regulation at issue.

The regulation applies to a university publication "which is distributed or intended to be distributed primarily to persons under 21 years of age." 3 Va. Admin. Code § 5-20-40(B)(3). One of the plaintiffs, *The Cavalier Daily*, distributes its newspaper on the grounds of the University of Virginia and five locations off campus. (Pet. App. 9a). Approximately 49% of "on-grounds" students at UVa. are under the age of 21, and between 36-42% of all UVa. students, both graduate and undergraduate, are under the age of 21. (Pet. App. 10a). As to the other plaintiff, *Collegiate Times*, approximately 41% of its total readership is under the age of 21. (Pet. App. 6a).

The panel majority never reached the question of whether the plaintiffs were even implicated by the

plain language of the regulation. Judge Moon, in his dissent from the panel majority, concluded that

> the regulation, properly construed, does not apply to these newspapers. '[T]he parties agree that a majority of the readership of the college newspapers is over the age of twenty-one,' and the undisputed statistical evidence in the record supports that agreement. More than half of the students at these universities are over the age of twenty-one, as of course are most faculty and staff. Given that a majority of the readership is over the age of twenty-one, these college newspapers, are not 'distributed or intended to be distributed primarily to persons under 21 years of age,' as required to be subject to the strictures of 3 Va. Admin. Code § 5-20-40(B)(3). This case could be resolved on that ground without reaching the broader constitutional question.

(Pet. App. 80a-81a) (citations omitted).

In the view of the ABC Board, the regulation *does* apply to the plaintiffs. A Virginia court, however, may well disagree. Virginia courts "give 'great deference' to an agency's interpretation of its own regulations." *Bd. of Supervisors v. State Bldg. Code Technical Review Bd.*, 663 S.E.2d 571, 574 (Va. Ct. App. 2008). However, "deference is not abdication, and it requires [Virginia courts] to accept only those principles of agency interpretations that are reasonable in light of the principles of construction courts normally employ." *Id. See also Avalon Assisted Living Facilities*

v. Zager, 574 S.E.2d 298, 307 (Va. Ct. App. 2002) (principles of statutory construction apply with equal force "to the interpretation of regulations adopted by an administrative agency. . . ."). Consistent with this Court's jurisprudence, Virginia courts "have a duty when construing a statute [or regulation] to avoid any conflict with the Constitution." *Commonwealth v. Doe*, 682 S.E.2d 906, 908 (Va. 2009) (citing cases). *See also Jeffress v. Stith*, 402 S.E.2d 14, 16 (Va. 1991) ("any construction of a statute or regulation that would make either unconstitutional should be avoided.").

When faced with the question of whether the regulation applies at all to the plaintiffs, a Virginia court may well construe the regulation in a manner that avoids any constitutional objection. If the regulation does not reach the plaintiffs' publications because their publications are not "distributed or intended to be distributed primarily to persons under 21 years of age," 3 Va. Admin. Code § 5-20-40(B)(3), the plaintiffs' constitutional controversy disappears. By the same token, this Court may well conclude the same. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (1997) (in construing state statutes, federal courts apply the "'cardinal principle'" that seeks to "'first ascertain whether a construction . . . is fairly possible' that will contain the statute within constitutional bounds.") (citations omitted).

There is no reason for this Court to grant certiorari when the state regulation at issue has never been construed by a state court, and that

construction may well resolve any controversy involving these plaintiffs. As this Court has noted, a "federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Id.* at 79. Alternatively, the Court should certify the question to the Supreme Court of Virginia. *Id.* at 79-80. *See also* Va. Sup. Ct. R. 5:42 (providing for procedure of certification of questions of law from this Court to the Supreme Court of Virginia).

III. THE CASE IS INCOMPLETE INASMUCH AS THERE ARE ALTERNATIVE FEDERAL GROUNDS REMAINING FOR DECISION ON REMAND.

Furthermore, the plaintiffs have two arrows remaining in their quiver. The Fourth Circuit expressly declined to examine whether the regulation, although valid on its face, was being unconstitutionally applied to these two plaintiffs. (Pet. App. 72a n.2). Instead, the court limited its holding to the *facial* constitutionality of the regulation. The Fourth Circuit also declined to reach the question of whether the regulation "unconstitutionally discriminates against a particular segment of the media." (*Id.*) Given these unresolved issues that may yet afford the plaintiffs relief, there is no reason for this Court to grant certiorari at this juncture.

IV. EVEN IF THE FOURTH CIRCUIT AND THE THIRD CIRCUIT DIFFER IN THEIR APPLICATION OF THE THIRD AND FOURTH PARTS OF THE *CENTRAL HUDSON* TEST, THE SHALLOWNESS OF THE SPLIT MILITATES AGAINST GRANTING CERTIORARI AT THIS JUNCTURE.

According to the plaintiffs, the approach of the Fourth Circuit conflicts with the Third Circuit's decision in *The Pitt News*. Of course, in the respondents' view, *The Pitt News* and the case at bar constitute fact-specific applications of legal principles to differing regulations, based on a different evidentiary record. This Court expressly has approved of the use of "common sense" in assessing whether a government regulation of commercial speech advances a governmental interest. *See Lorillard Tobacco Co.*, 533 U.S. at 555 (in assessing whether a regulation directly advances the governmental interest asserted, courts may turn to "history, consensus, and simple common sense."). Precisely when courts should turn to common sense and when empirical or historical evidence is necessary will depend on case specific considerations. But even if a split does exist, given the complexity of the issue, there is no reason why the issues should not be permitted to percolate in the lower courts before they reach this Court.

CONCLUSION

For reasons stated above, the Petition for a Writ of Certiorari should be **DENIED**.

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No. 10-278

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IN THE

Supreme Court of the United States

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INCORPORATED; CAVALIER DAILY, INCORPORATED,

Petitioners,

—v.—

SUSAN R. SWECKER, Commissioner, Virginia Alcoholic Beverage Control Commission; PAMELA O'BERRY EVANS, Commissioner, Virginia Alcoholic Beverage Control Commission; W. CURTIS COLEBURN, III, Chief Operating Officer Virginia Department of Alcoholic Beverage Control; FRANK MONAHAN, Director, Law Enforcement Bureau of the Virginia Department of Alcoholic Beverage Control; ESTHER H. VASSAR, Commissioner, Virginia Alcoholic Beverage Control Commission,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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I. THE COURT OF APPEALS RELIED ON "COMMON SENSE" RATHER THAN EVIDENCE IN UPHOLDING THE CHALLENGED REGULATION, IN DIRECT OPPPOSITION TO THE THIRD CIRCUIT DECISION IN *PITT NEWS*.

The Respondents argue that this case is distinguishable from *Pitt News v. Pappert*, 379 F.3d 96 (3rd Cir. 2004), because in this case, the government submitted evidence supporting a link between advertising in college newspapers and underage and binge drinking on campus. (Br. in Opp. at 7-8.) In fact, as in *Pitt News*, no evidence in the record supports such a link.

Although the Court of Appeals declared that "the link between § 5-20-40(B)(3) and decreasing demand for alcohol by college students [is] amply supported by the record," App. 77a, it did not identify any relevant record evidence. The court's sole citation to the record is a statement by Respondent W. Curtis Coleburn, the Chief Operating Officer of the Department of Alcoholic Beverage Control, that "[t]he college publication is where [college students are] looking to find out what's going on in their college community, what's happening." App. 77a (alteration in original). Based on this assertion, the court found it "*counterintuitive* for alcohol vendors to spend their money on advertisements in newspapers with relatively limited circulation, directed primarily at college students, if they believed that these ads would not increase demand by college students." *Id.* (emphasis added). Thus, the supposed connection between

alcohol advertising in college newspapers and college student drinking[1] derives from the court's intuition, based on the Respondent's understanding of the role of college newspapers, not on any evidence for such a link. Tellingly, this intuition is directly contrary to the Third Circuit's in *Pitt News*. *See* 379 F.3d at 107 (finding it "counterintuitive" to believe that an advertising ban in student newspapers would lessen drinking by college students exposed to a "torrent" of alcohol advertising from other sources).

Notably, the Court of Appeals did not purport to rely on any of the evidence that the Respondents claim, in their brief, demonstrates the efficacy of the regulation, and with good reason. Respondents point first to the testimony of their expert, Dr. Henry Saffer, to the effect that alcohol advertising increases consumption and that a decrease in advertising would decrease consumption. But undermining those broad conclusions was Dr. Saffer's acknowledgement that "'[t]here is . . . very little empirical evidence

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[1] As the dissent notes (App. 86a), "[t]he Board's justification for the regulation is not to reduce general 'demand by college students,' a significant number of whom are of legal age to imbibe, but to reduce '*underage* and *abusive* drinking among college students.'" (quoting Appellants' Br. at 2) (emphasis in original). Even if the supposed uniqueness of college student publications could be considered evidence of a link between advertising in college newspapers and demand for alcohol on campus, there certainly is no evidence that such advertising would cause an increase in underage and abusive drinking, rather than moderate drinking by students of legal age.

that alcohol advertising has any effect on actual alcohol consumption,'" and that "a ban on advertising in one medium generally results in greater advertising saturation in other media or forms of marketing." App. 85a. Further, Dr. Saffer has not conducted, and was not able to recall, any studies specifically examining the effectiveness of advertising bans in college student publications. J.A. 528-29.

Respondents also refer to statements from the Dean of Students and the Director of the Center for Alcohol and Substance Abuse Education at UVa, and the Director of Judicial Affairs at Virginia Tech, all to the effect that the regulation "will effectively assist" each institution's efforts to prevent underage drinking. Br. in Opp. at 8; App. 14a-15a. But as the district court noted, "these individuals likely do not qualify to offer expert opinions under Fed. R. Evid. 701," and, in any case, their conclusory statements are not supported by any evidence. App. 37a-38a.

Finally, neither the Court of Appeals nor the Respondents cite any evidence that the advertising advances the government's interests "to a material degree," as this Court's precedents require. *See Edenfield v. Fane*, 507 U.S. 761, 771 (1993); *44 Liquormart v. Rhode Island*, 517 U.S. 484, 505 (1996).

Thus, "as in *Pitt News*, 'the Commonwealth relies on nothing more than "speculation" and "conjecture"'" to support its claim that the advertising ban directly and materially reduces underage and abusive drinking. App. 85a (Moon, J., dissenting) (quoting *Pitt News*, 379 F.3d at

107-08). The Court should grant *certiorari* to clarify that such speculation, even when couched in terms of "logic" and "common sense," cannot justify a restriction on commercial speech, and to resolve the conflict between the Fourth Circuit and the Third Circuit.

II. PETITIONERS ARE NOT REQUIRED TO OBTAIN A STATE COURT CONSTRUCTION OF THE REGULATION BEFORE CHALLENGING IT IN FEDERAL COURT.

Respondents urge the Court to deny *certiorari* because no state court has determined that the challenged regulation applies to the Petitioners.[2] At the same time, they acknowledge that the Alcoholic Beverage Control Board, the agency charged with enforcing the challenged regulation, interprets it to apply to the Petitioners (Br. in Opp. at 11), and presumably would enforce the regulation against Petitioners if they violated it. Under these circumstances, the Petitioners need not wait for a state court to interpret the regulation before they may challenge its constitutionality in federal court. To hold otherwise would require Petitioners either to file a declaratory judgment action in state court seeking a construction of the regulation, or to engage in proscribed conduct and

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[2] Notably, the Respondents raise this issue for the first time in this Court. At no other time have they suggested that the regulation might not apply to the Petitioners, or that the absence of a state court construction might preclude a federal court ruling on its constitutionality.

risk prosecution. This Court has consistently rejected such prerequisites to federal court challenges to state laws.

This Court has long held that, faced with putatively unconstitutional state law, "it is not necessary that the plaintiff first expose himself to actual arrest or prosecution to be entitled to challenge the statute that he claims deters the exercise of his constitutional rights." *Babbit v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (citation and internal quotation marks omitted). Rather, to challenge such a law in federal court, the plaintiff need only show an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution there under." *Id.* "[A] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

Nor must a plaintiff file a civil suit seeking a state court construction of a speech-restrictive state law before challenging it in state court. Such a requirement would be equivalent to obliging plaintiffs to exhaust state remedies, which this Court has held is not a condition for bringing a federal lawsuit under 42 U.S.C. § 1983. *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE
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EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INCORPORATED; CAVALIER DAILY, INCORPORATED,
PETITIONERS,

v.

SUSAN R. SWECKER, COMMISSIONER, VIRGINIA ALCOHOLIC BEVERAGE CONTROL COMMISSION; PAMELA O'BERRY EVANS, COMMISSIONER, VIRGINIA ALCOHOLIC BEVERAGE CONTROL COMMISSION; W. CURTIS COLEBURN, III, CHIEF OPERATING OFFICER VIRGINIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; FRANK MONAHAN, DIRECTOR, LAW ENFORCEMENT BUREAU OF THE VIRGINIA DEPARTMENT OF ALCOHOLIC CONTROL; ESTHER H. VASSAR, COMMISSIONER, VIRGINIA ALCOHOLIC BEVERAGE CONTROL COMMISSION,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* ASSOCIATION OF NATIONAL ADVERTISERS, INC., AMERICAN ADVERTISING FEDERATION, AND AMERICAN ASSOCIATION OF ADVERTISING AGENCIES IN SUPPORT OF PETITIONERS

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Cf. Pitt News, 379 F.3d at 101, 108 ("more than 67% of Pitt students and more than 75% of the total University population is over the legal drinking age"). Thus, review by this Court is essential in this case not only to address the vital issues raised by the Petition for *Certiorari*, but also those it implicates relating to restrictions on the ability of advertisers to reach young-adult consumers.

This case also offers an important opportunity to clarify the role "common sense" may play in *Central Hudson* direct-and-material-advancement analyses. The Third Circuit demanded evidence of direct and material advancement in *Pitt News*, *see*, 379 F.3d at 107, but *Educational Media* allows resort to nothing more than "history, consensus and common sense" to support restrictions on speech. Pet. at 10-15. This divergence by the circuit courts also should be remedied by granting review here.

CONCLUSION

For the foregoing reasons, *amici* Advertising Associations respectfully request that the Court grant the Petition for *Certiorari*.

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IN THE

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EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INCORPORATED, *ET AL.*,

Petitioners,

v.

SUSAN R. SWECKER, Commissioner, Virginia Alcoholic Beverage Control Commission, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Fourth Circuit erred by upholding as constitutional Virginia's ban against advertising alcohol in college newspapers, where a majority of the newspapers' readership consists of adults over twenty-one years of age, in direct conflict with the Third Circuit's decision striking down nearly identical restrictions in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004).

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a public interest law and policy center headquartered in Washington, D.C., with supporters in all 50 States, including Virginia.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has appeared before this and numerous other state and federal courts to promote the First Amendment rights of the business community. While WLF believes that government has an appropriate role to play in ensuring that commercial speakers do not provide false or misleading information to consumers, WLF has consistently opposed government efforts to censor or otherwise prevent consumers from hearing truthful speech. *See, e.g., Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

WLF supports each of the arguments made by Petitioners, but writes separately to emphasize that the Fourth Circuit's treatment of the third prong of *Central Hudson* in this case was so watered down and deferential to the government that it rendered that

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for either party authored this brief in whole or in part; and that no entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before the filing deadline, WLF's counsel provided counsel for Petitioners and Respondents with notice of intent to file.

prong essentially meaningless. If the Fourth Circuit's decision stands, state governments can simply assert a theoretical link in commercial speech cases between a restriction on advertising and the State's purported interest with no actual evidence, appeal to the "common sense" of the court, and effectively shift the burden to the speaker to produce specific data to contradict this theoretical and speculative link. Such an approach would mark a fundamental shift away from this Court's precedent and severely weaken the protections afforded to commercial speech by the First Amendment. Accordingly, this Court should grant the petition for a writ of certiorari to clarify the proper application of the third prong of the *Central Hudson* test and to resolve a split of authority between the Third and Fourth Circuits.

WLF has no direct interest, financial or otherwise, in the outcome of this case. WLF submits this brief solely to further the public's interest in preserving the important commercial speech protections afforded by the First Amendment. All parties have consented to the filing of this brief, and written letters of consent have been lodged with the Court.

STATEMENT OF THE CASE

This case raises important questions regarding the State's burden to prove that a restriction on commercial speech directly and materially advances the State's interest under the third prong of the test for restrictions on commercial speech established by this Court in *Cent. Hudson Gas & Elec. Corp v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). The decision below, if allowed to stand, will significantly weaken the protections the First Amendment affords to all forms of

commercial speech.

The Virginia Department of Alcohol and Beverage Control ("ABC Department") is responsible for regulating the sale and distribution of alcoholic beverages in the Commonwealth of Virginia. Pet. App. 12a. The Alcoholic Beverage Control Board ("ABC Board") promulgates regulations regarding the sale and distribution of alcoholic beverages. *Id*; Va. Code § 4.1-111. The ABC Board enacted 3 VAC 5-20-40 (B)(3) (the "alcohol advertising ban"), which essentially prohibits the advertising of alcohol brands in all college publications. It provides in relevant part:

> Advertisements of beer, wine and mixed beverages are not allowed in college student publications unless in reference to a dining establishment, except as provided below.
>
> . . . .
>
> Advertising of beer, wine and mixed beverages by a dining establishment in college student publications shall not contain any reference to particular brands or prices and shall be limited only to the use of the following words: "A.B.C. on-premises," "beer," "wine," "mixed beverages," "cocktails," or any combination of these words . . .

Id. at 2a-3a. The Commonwealth of Virginia claims that the alcohol advertising ban seeks to further the State's interest in reducing underage and over-consumption of alcohol on college campuses. *Id.* at 29a (citing Defs'. Mem. Supp. Summ. J. 19-20).

Petitioner Educational Media Company at Virginia Tech, Inc. is a non-profit corporation that owns

The Collegiate Times, a student-run newspaper at the Virginia Polytechnic Institute and State University. Pet. App. 5a. Petitioner The Cavalier Daily, Inc. is a non-profit corporation that owns *The Cavalier Daily*, a student-run newspaper at the University of Virginia. *Id.* at 5a. *The Collegiate Times* and *The Cavalier Daily* are distributed free of charge on college campuses and in surrounding communities. *Id.* at 5a; 9a. The majority of readers of *The Collegiate Times* and *The Cavalier Daily* are twenty-one years of age or older, and therefore may legally purchase alcoholic beverages.[2] *See id.* at 6a; 10a. The newspapers' annual budgets consist almost entirely of advertising revenue. *Id.* at 5a; 9a.

Because of the Commonwealth's alcohol advertising ban, Petitioners have had to turn away potential revenue from businesses who wished to advertise alcoholic beverages. *Id.* at 7a-8a;10a-11a. These same businesses are able to advertise in competing, non-student publications. *Id.* Petitioners each estimate a loss of approximately $30,000 per year as a result of the prohibition on alcohol advertising. *Id.*

Petitioners challenged the alcohol advertising ban as unconstitutional, both on its face and as-applied. Ruling on the cross-motions for summary judgment, the district court found the regulation to be facially unconstitutional under *Central Hudson* because it fails to directly and materially advance a substantial governmental interest. *Id.* at 24a. The district court's

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[2] Although both newspapers have significant readership over the age of twenty-one, the ABC Board considers both *The Collegiate Times* and *The Cavalier Daily* to be "college student publications" that are subject to advertising restrictions of 3 VAC 5-20-40 (B)(3). Pet. App. 6a; 10a.

analysis began by placing the burden of proof on the Commonwealth to demonstrate that the regulation directly advances the governmental interest asserted. *Id.* at 21a. Respondents attempted to satisfy their burden by urging the court to inject a subjective overlay into the reasonableness test, whereby reasonableness is evaluated based on a subjective belief that the regulation directly advances the governmental interest—an argument the court rejected. *See Id.* at 30a-34a.

In evaluating the Commonwealth's interest, the district court relied on the Third Circuit's decision in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004), in which then Judge Alito invalidated a Pennsylvania statute banning advertisers from paying for alcohol advertising by communications media affiliated with an "educational institution." *Id.* at 33a-34a. *Pitt News* held that the State failed to adequately prove "a material degree" of advancement because, even if college students did not view the alcohol advertisement in a student publication, they will be exposed to alcoholic beverage advertisements in other mediums, including other free newspapers handed out on campus. *Id.* The district court noted that Respondents presented no record evidence that the ABC Board considered findings by expert researchers when enacting the alcohol advertising ban. *Id.* at 34a. Rather, the court concluded that "the Board could not have [considered such expert findings] because all the data before the court post-dates the regulation's enactment." *Id.* The district court thus held that Respondents' belated studies could not justify an earlier restriction on protected commercial speech since "[t]his *post hoc* presentation of the record does not explain the conduct of the regulatory board when considering its action,

which is a traditional anchor on which the reasonableness evaluation rests." *Id.*

Respondents appealed. In a divided opinion, the Fourth Circuit reversed, holding that Virginia's advertising ban satisfies the four-pronged *Central Hudson* test. *See id.* at 80a. While both the majority and dissent agreed that the first two prongs of the *Central Hudson* test were satisfied, the opinions differed significantly with respect to the third and fourth prongs. As for the third prong's requirement that the regulation directly advances the State's interest, the majority opinion relied solely on "history, consensus, and common sense" to find a link between advertising bans in college newspapers and a decrease in demand for alcohol among college students. *Id.* at 76a-77a. In addition, the majority imposed on the college newspapers the burden of "*specifically* contradict[ing] this link." *Id.* at 77a-78a (emphasis in original). Addressing the fourth prong of *Central Hudson*, the majority found that the Commonwealth's alcohol advertising ban, as part of an overall scheme to combat underage drinking, was narrowly tailored to serve the Commonwealth's asserted interest. To support this conclusion, the majority relied on the fact that only certain types of alcohol advertisements were prohibited and that the restriction applies only to "college student publications." *Id.* at 78a-79a.

In dissent, Judge Moon stated that he would have affirmed the district court's ruling. Citing this Court's thirty-year precedent establishing a significant burden on the State to prove that the regulation directly advances the State's interest, he observed that here, as in *Pitt News*, the "Commonwealth relies on nothing more than speculation and conjecture." *Id.* at 84a-85a.

Judge Moon also dissented with respect to the majority's finding that the regulation was narrowly tailored to meet Virginia's goal of curbing underage drinking. Finding a poor fit between the regulation and Virginia's asserted goal, Judge Moon reasoned that it was inconsistent for the Commonwealth to permit an advertisement for "beer night" at a dining establishment merely because the regulation forbids advertising specific brand names. *Id.* at 86a-88a. Relying again on *Pitt News*, Judge Moon found the regulation to be "severely over-and-under inclusive" since the majority of the readership of these newspapers is of legal age to drink. *Id.* at 89a. While recognizing that the regulation need not be "the single best disposition," Judge Moon nonetheless found that the advertising ban here offers "only ineffective or remote support," not a direct means, to combat underage and abusive drinking. *Id.* at 89a-90a.

The Fourth Circuit subsequently denied Petitioners' motion for rehearing *en banc*. *Id.* at 93a.

REASONS FOR GRANTING THE PETITION

Alcohol distributors "have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information" about those products. *See Lorillard Tobacco Co., v. Reilly*, 533 U.S. 525, 564 (2001). The decision below incorrectly prohibits adult readers over the age of twenty-one–who comprise the majority of readers of the *Collegiate Times* and *The Cavalier Daily*–from receiving such information. Pet. App. 43a. Thus, the decision below incorrectly and contrary to this Court's precedent permits the

Commonwealth of Virginia to "reduce the adult population . . . to reading only what is fit for children." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700 (1977).

The petition should be granted for several reasons. First, the decision below directly conflicts with the Third Circuit's decision in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004). Considering a substantially similar commercial speech restriction on alcohol advertising in college newspapers, *Pitt News* applied the third prong of Central Hudson in a significantly different manner than the Fourth Circuit did in this case, yielding a conflicting and contrary result. Accordingly, this Court should grant the petition for certiorari to resolve the split between the Third and Fourth Circuits.

The Fourth Circuit's analysis below also significantly waters down the third prong of the *Central Hudson* test in significant ways. By ignoring record evidence presented by both parties, the appeals court panel chose instead to rely entirely on its own "common sense" analysis. Such an analysis, relieved of any grounding in hard evidence, is necessarily subjective and is contrary to this Court's established precedent.

Further, the Fourth Circuit's analysis completely ignores the issue of materiality. This failure directly contradicts a long line of authorities from this Court holding that a restriction on commercial speech must directly advance a State's interests "*to a material degree.*" *See, e.g., Greater New Orleans Broad. Ass'n, Inc. v. U.S.*, 527 U.S. 173 (1999) (emphasis added). As

this Court has repeatedly warned, without this crucial safeguard, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Id.* at 188 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993))).

Finally, the Fourth Circuit's analysis improperly held that, in the case of a facial challenge, the burden shifts to the *speaker* to *disprove* the theoretical link between a restriction on advertising in one narrow media segment and a reduction in demand, as asserted by the Commonwealth. But this Court has long held that mere assertion of a link between advertising and demand is insufficient to satisfy the third prong of *Central Hudson* without proof that the restriction at issue in fact *directly* and *materially* reduces demand. Given that a theoretical link between advertising and material changes in demand, no matter how tenuous, is used to justify nearly all restrictions on commercial speech, the appeals court's unquestioned acceptance of this linkage significantly undermines the protections afforded by *Central Hudson*.

Accordingly, this Court should grant the petition for writ of certiorari to provide lower courts with guidance on the proper application of the third prong of the *Central Hudson* test.

I. REVIEW IS WARRANTED TO RESOLVE AN IRRECONCILABLE SPLIT IN AUTHORITY BETWEEN THE THIRD AND FOURTH CIRCUITS

This case involves a First Amendment challenge to the Commonwealth of Virginia's ban on certain alcohol advertisements in all college student publications. *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004), involved a First Amendment challenge to Pennsylvania's ban on alcohol advertising in college student publications. In both cases, the majority of the readers of the publications were twenty-one years of age or older. Likewise, in both cases, the government claimed to have a substantial interest in combating underage drinking and alcohol abuse by college students, which interest was materially advanced by the advertising ban. Although both courts applied the *Central Hudson* four-part test, the similarities in these two cases end there. In *Pitt News*, the Third Circuit struck down the advertising restriction under *Central Hudson*. But here the Fourth Circuit upheld Virginia's advertising restriction under *Central Hudson*. Despite the factual similarities, the applications of the *Central Hudson* test by the Third and Fourth Circuits are markedly different.

Both the Third and Fourth Circuit opinions cite *Lorillard Tobacco Co., v. Reilly*, 533 U.S. 525 (2001), to articulate the requirements of the third prong of the *Central Hudson* test. As stated in *Lorillard*, the third prong

> requires that the speech restriction directly and materially advance the asserted governmental interest. This burden is not satisfied by mere

> speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real *and that its restriction will in fact alleviate them to a material degree.* We do not, however, require that empirical data come . . . accompanied by a surefeit of background information . . . . We have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions *based solely on history, consensus, and simple common sense.*

Lorillard, 533 U.S. at 555 (citations and internal quotation marks omitted) (emphasis added). The Third Circuit's analysis of the third prong of *Central Hudson* properly focused on whether the speech restriction would "alleviat[e] the cited harm to a material degree." *Pitt News*, 379 F.3d at 107. In finding that the alcohol advertising ban did not satisfy this prong, the Third Circuit did not dispute that, generally speaking, alcohol advertisements encourage consumption. *Id.* But because the government provided no evidence whatsoever that applying the ban to only those media directed at educational institutions would greatly reduce the quantity of alcohol ads viewed by underage students, the Third Circuit found that the third prong was not satisfied. *Id.* The court recognized that, even if *The Pitt News* did not contain alcohol ads, students "will still be exposed to a torrent of beer ads on television and the radio, and . . . in other publications." *Id.* According to the court, "[c]ommon sense suggests that would-be drinkers will have no difficulty finding those [places near campus where alcohol may be purchased] despite

[the advertising ban], and the Commonwealth has not pointed to any contrary evidence." *Id.*

The majority opinion in this case, however, applied the third prong of the *Central Hudson* test much differently. In its analysis, which from the outset was deferential to the Commonwealth, the appeals court evaluated the government's ability to justify its ban not by considering and weighing the empirical evidence, as required, but rather by consulting "history, consensus, and simple common sense."[3] Pet. App. 76a. The appeals court panel found that the generic correlation between advertising and demand, coupled with the fact that college publications specifically target college students, was enough to establish a common sense link between the advertising restrictions at issue and the Commonwealth's interest in decreasing demand for alcohol by college students. *Id.* at 77a. Unlike the Third Circuit in *Pitt News*, the Fourth Circuit majority failed entirely to address whether the government had met its burden to show that the advertising restriction would alleviate by a "material degree" the harms the

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[3] The appeals court derived its reliance on "history, consensus, and simple common sense" from *Burson v. Freeman*, 504 U.S. 191, 211 (1992), a First Amendment case involving non-commercial speech in which this Court upheld a "campaign-free zone" within 100 feet of a polling place. *Id.* at 193. Following an extensive review of the history of election regulations, which found a dearth of empirical evidence on the effects of century-old voting regulations, this Court held that the state was not required to proffer empirical data to prove that a 100-foot boundary was narrowly tailored to prevent voter intimidation and election fraud. *Id.* at 208-09. Thus, the Fourth Circuit evidently relied on a case where empirical data was not available as the primary basis for its analysis in this case where data and specific findings were readily available.

government was purportedly trying to prevent. Indeed, the court held that because the *speakers* provided no evidence to specifically contradict the claimed theoretical link between advertising and demand, the alcohol advertising ban therefore satisfied the third prong of the *Central Hudson* test.

In sum, the Third and Fourth Circuit's drastically different approaches to the third prong of the *Central Hudson* test yield contradictory conclusions under strikingly similar facts. As such, a clear circuit split exists that needs to be resolved by this Court to afford proper guidance to the lower courts in future First Amendment cases applying the *Central Hudson* test for advertising restrictions on legal products.

II. REVIEW IS WARRANTED TO CLARIFY THE ROLE "COMMON SENSE" PLAYS IN SHIFTING THE BURDEN OF PROOF IN FACIAL CHALLENGES OF ADVERTISING RESTRICTIONS

Since this Court's decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), commercial speech has been increasingly afforded greater First Amendment protection. Indeed, members of this Court have discussed eliminating all or part of the *Central Hudson* test in favor of a stricter level of scrutiny. *See, e.g, id.* at 518-20 (Thomas, J., concurring). The *Central Hudson* test remains in place, yet has been applied inconsistently and sometimes improperly by lower courts since *44 Liquormart*. In the instant case, the Fourth Circuit's analysis and application of the third prong of the *Central Hudson* test is so watered down as

to render that prong meaningless.[4]

Under the third prong of *Central Hudson*, the government bears the burden of proving that a restriction on commercial speech "directly advances the governmental interest asserted," *Cent. Hudson*, 447 U.S. at 566, and that it does so "to a material degree." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626 (1995). This prong is "critical" because, without it, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Rubin*, 514 U.S. at 487 (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). Thus, the government's burden "is not satisfied by mere speculation or conjecture." *Edenfield*, 507 U.S. at 770-71. Indeed, it is insufficient that a restriction "provides only ineffective or remote support for the government's purposes," *id.* at 770, or if the restriction has "little chance" of advancing the state's

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[4] The Fourth Circuit's panel majority looked primarily to its own opinion in *WV Ass'n of Club Owners and Fraternal Servs, Inc. v. Musgrave*, 553 F.3d 292 (4th Cir. 2009) to analyze the legal issues in this case. This is troubling because *Musgrave* explicitly distinguished itself from "the *Central Hudson* line of cases." 553 F.3d at 301. In *Musgrave*, the regulated speech was a mixture of both government and private commercial speech. As such, according to the *Musgrave* court, "the state's interest is higher because the state has an ownership interest, not just a regulatory interest." *Id.* The court went on to say "[w]e continue to use *Central Hudson* as a guide, but . . . the government speech aspects . . . provide additional weight in favor of upholding the state's regulations that is simply not present in other commercial speech cases." *Id.* Thus, instead of relying on this Court's commercial speech precedent, the Fourth Circuit relied on its own idiosyncratic opinion, which took great pains to distinguish itself from the very test at issue.

goal. *Id.* The Fourth Circuit wholly ignored these considerations and instead applied its own water-downed version of this critical prong of the *Central Hudson* test.

A. The Fourth Circuit Mistakenly Held, Through Reliance on Mere "Common Sense," That a Theoretical Link Between Advertising and Demand Satisfied the Commonwealth's Burden to Show That the Restriction at Issue "Directly Advances" Its Interest "to a Material Degree"

The Fourth Circuit's analysis was flawed from the outset because of its over-reliance on "common sense" to find a link between Virginia's advertising restriction and the government's interest of reducing underage drinking among college students. The panel's majority opinion makes no mention, much less attempts a detailed analysis, of how the alcohol advertising ban will actually reduce underage drinking in a material way as required by this Court's First Amendment precedent. But "common sense," standing alone, cannot satisfy the State's burden because, as the Third Circuit correctly noted, common sense can just as easily lead to the opposite result, e.g., students will have no trouble finding those establishments where alcohol can be purchased even if alcohol advertising is prohibited in college publications. *Pitt News*, 379 F.3d at 107.

While courts can look to "common sense" when evaluating a restriction on constitutionally protected speech, this is not the entire analysis for deciding whether a restriction on commercial speech directly and materially advances the government's interest. This is

especially so where, as here, the government fails to provide evidence supporting its rationale for the restriction on advertising—in the face of evidence directly contradicting the government's purported rationale. Here, the district court, through a careful review of the evidence, determined that not a single witness testified as to how this regulation, which has been in effect for decades, has directly advanced the government's interest in preventing underage alcohol consumption or abusive drinking. Nor was there any evidence as to how the regulation has alleviated the problem or *any* effect the regulation has had in the past. *Id.* at 37a-38a. The Fourth Circuit did not quibble with these factual findings, but rather simply ignored them in favor of its own common sense view that a link existed between the advertising restriction and the government's interest in decreasing the demand for alcohol among college students.

A "common sense" link between a restriction on advertising and demand, however, does not alone provide the level of evidentiary support necessary to uphold a government restriction on advertising. For example, in *Greater New Orleans*, the government similarly relied on the bald assertion of a link between advertising for casino gambling and increased demand for such gambling. *Greater New Orleans Broad. Ass'n, Inc. v. U.S.*, 527 U.S. 173, 189 (1999). The government argued further that the type of advertising at issue, broadcast advertising, was particularly dangerous to compulsive gamblers given its "pervasiveness and potency." *Id.* This Court rejected these assertions—as well as the limited evidence proffered to support them—as insufficient to meet the government's burden, noting that "[w]hile it is no doubt fair to assume that more advertising would have some impact on overall

demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another." *Id.* As a result, this Court concluded that "the Government fails to connect casino gambling and compulsive gambling with broadcast advertising for casinos . . . ." *Id.*; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (noting that common sense supported a conclusion that a prohibition on price advertising will tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market, but nonetheless holding "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance"); *Pitt News*, 379 F.3d at 107 (finding that the government's assertion that elimination of alcoholic beverage ads from student newspapers, but not from other media, will reduce demand by college students is "counterintuitive and unsupported by any evidence"); *compare Lorillard*, 533 U.S. at 556-61 (examining and relying upon numerous studies and other evidence presented by the government supporting a link between tobacco advertising and underage use of tobacco).

Even in the face of *some* supporting evidence, this Court has resisted the temptation to readily accept a theoretical link between a restriction on advertising and demand as sufficient to meet the government's burden to restrict commercial speech. By contrast, in this case, the Fourth Circuit required *no* evidence to determine whether the government had met its burden and, in fact, improperly placed the burden of proving otherwise on the Petitioners. The Fourth Circuit's approach thus flies in the face of established Supreme Court precedent.

Moreover, as noted by the dissent, the decision below entirely neglects the materiality aspect of *Central Hudson*'s third prong. This Court has repeatedly held that, to satisfy its burden, the government must show not only that a restriction "directly advances" its asserted interest, but also that it does so "to a material degree." *Rubin*, 514 U.S. at 487. For example, in *44 Liquormart*, the Court rejected a State's ban on price advertising in the absence of evidence that it had any significant effect on demand for alcoholic beverages. *44 Liquormart*, 517 U.S. at 505-06. Even accepting the government's theory that a ban on price advertising would decrease aggregate demand and thereby advance the government's interest, the Court held that the government failed to meet its burden because it had not presented any evidence that the decrease in demand would be significant. *See id.* at 506-07.

Similarly, in *Pitt News*, the Third Circuit rejected a regulation on alcohol advertisements in college student publications nearly identical to that challenged in this case, holding that the regulation did not combat underage or abusive drinking "to a material degree." *Pitt News*, 379 F.3d at 107. The Third Circuit noted that the regulation at issue "applies only to advertising in a very narrow sector of the media . . . , and that the Commonwealth has not pointed to any evidence that eliminating ads in this narrow sector will do any good." *Id.*

In stark contrast, the panel majority below failed to even consider the degree to which the challenged regulation would affect college drinking, let alone whether any effect would be material or significant. By relieving the government of its burden to prove that a

restriction advances its interests "to a material degree," the Fourth Circuit's decision gives wider latitude to regulators to restrict commercial speech even in the absence of proof of the effectiveness of the restriction. Review is thus warranted for this Court to clarify whether a government's unsupported assertion of a link between an advertising restriction and demand is sufficient to satisfy its burden of showing that a restriction "directly advances" its interest and does so "to a material degree."

B. The Fourth Circuit Erred by Improperly Shifting to Advertisers the Burden to Specifically Contradict the Claimed Link Between the Restriction and the Commonwealth's Stated Interest

In addition to relying merely on "common sense" and failing to analyze whether the restriction directly and materially advanced the government's interest, the Fourth Circuit went one step further in eradicating the third prong of *Central Hudson* by improperly shifting the burden of proof to the speakers to contradict the alleged link between the advertising restriction and the government's interest. The panel majority initiated this burden shift from the start of its opinion. Although stating that the *Central Hudson* test "applies to both facial and as-applied challenges," the appeals court then stated, without explanation or citation to any supporting case law, that the *type* of challenge to a provision—facial or as-applied—dictates the State's burden of proof. Pet.

App. 73a.[5] The Fourth Circuit then signaled that the weight of the government's burden under *Central Hudson* is lower in the case of a facial challenge than in the case of as-applied challenges. In support of this proposition, the panel cites *Penn Advertising*, a case that rests on the questionable precedent set by *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995). In *Penn Advertising*, the Fourth Circuit quoted *Anheuser-Busch* for the proposition that:

> [I]n response to a facial challenge to a regulation of commercial speech, the burden falls on the government to justify its legislative action, but it does not demand that the government canvass every conceivable situation in which some member of the public may be affected atypically by the statute. And the court's inquiry is limited to consideration of the ordinance on its face against the background of the government's objective and the prospect of the ordinance's general effect. If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met.

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[5] In footnote 4 of its opinion, the Fourth Circuit also apparently attempts to distinguish the instant case from *Pitt News* by stating that *Pitt News* involved an as-applied challenge. We submit, however, that this is a distinction without a difference because the constitutional analysis, including the burden of proof set out in *Central Hudson*, does not change based on whether it is a facial or as-applied challenge. In a facial challenge, the burden remains on the government to demonstrate that at least *some* application of the statute could survive a First Amendment challenge under the *Central Hudson* test.

Penn Adver. of Baltimore, Inc. v. Mayor and City Council of Baltimore, 63 F.3d 1318, 1322-23 (4th Cir. 1995) (quoting *Anheuser-Busch*, 63 F.3d at 1311).

In its citation to *Penn Advertising*, the panel majority below cryptically notes that the case was "vacated on other grounds." Pet. App. 73a-74a. But in fact this Court specifically vacated and remanded[6] the case for further consideration in light of *44 Liquormart*, a case that seriously called into doubt precisely the portions of *Penn Advertising* and *Anheuser-Busch* that the Fourth Circuit purportedly relies on for its deferential application of the *Central Hudson* test. *See 44 Liquormart*, 517 U.S. at 508-14 (severely limiting legislative deference in applying the *Central Hudson* test).[7]

Setting aside the questionable *Penn Advertising* and *Ansheuser-Busch* decisions on which the Fourth Circuit relies, this Court's own recent precedent makes no distinction between facial and as-applied challenges in analyzing the weight of the government's burden under *Central Hudson*. Indeed, *44 Liquormart*, *Lorillard*, and even *Central Hudson* itself all involved facial challenges to restrictions on commercial speech, yet none of these cases even remotely suggests that the government bears a lighter burden of proof under

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[6] *See Penn Adver. of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 518 U.S. 1030 (1996).

[7] These cases have also been largely overturned by *Lorillard*, in which this Court invalidated a regulation in Massachusetts that was substantially similar to the regulations at issue in *Penn Advertising* and *Anheuser-Busch*.

Central Hudson based on the fact that a facial challenge was at issue.

Despite the lack of precedent from this Court for shifting the burden to the speaker in facial challenges to restrictions on commercial speech, the Fourth Circuit nevertheless improperly held that "the college newspapers fail to provide evidence to *specifically* contradict" the link the court found between the restriction and demand for alcohol by college students. Pet. App. 77a-78a. Given that a theoretical link between advertising and demand is asserted by the government in nearly all advertising speech cases, the appeals court's approach is highly problematic. Shifting the burden to plaintiffs to *disprove* this link in such cases is a significant reversal of established case law and is likely to have a chilling effect on advertising and other commercial speech.

At bottom, the Fourth Circuit's opinion is completely devoid of any real analysis under the third prong of the *Central Hudson* test. By simply accepting the theoretical link asserted by the government based on mere "common sense," the Fourth Circuit in effect rendered this critical prong meaningless. If the Fourth Circuit's decision stands, the government in commercial speech cases can simply assert a theoretical link between a restriction on advertising and the government's interest with no actual evidence, appeal to the "common sense" of the court, and then immediately shift the burden to the speakers to produce specific data to contradict this theoretical and speculative link. This would mark a fundamental shift away from this Court's precedent and severely weaken the protections afforded by the First Amendment to commercial speech.

As such, this Court should grant the petition for certiorari to clarify the role of "common sense" in the third prong of the *Central Hudson* test, to clarify whether a government's unsupported assertion of a link between an advertising restriction and demand is sufficient to satisfy its burden of showing that a restriction "directly advances" its interest and does so "to a material degree," and to clarify whether the government must carry the same burden of proof under *Central Hudson* in both facial and as-applied challenges to restrictions on commercial speech.

CONCLUSION

For the foregoing reasons, *amicus curiae* WLF requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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